***United States Court of Appeals***

***for the Second Circuit***

# JOINT APPENDIX

# 76-7551

B
P/S

## United States Court of Appeals

FOR THE SECOND CIRCUIT

PHILO SMITH & CO., INC., and
JAMES E. RUTHERFORD,

*Plaintiffs-Appellants,*

*—against—*

USLIFE CORPORATION,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

# JOINT APPENDIX


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SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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# JOINT APPENDIX

## Docket Entries

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|---|---|
| 3-19-74 | Filed complaint and issued summons. |
| 4-16-74 | Filed Summons with Marshal's Return. Served USLife Corp. by Mr. Richard Hohn, V.P. on 4-10-74 |
| 4-25-74 | Filed Order. Time for Deft to answer to complaint to 5-29-74. Tenney, J. (mn) |
| 4-26-74 | Filed Pltff's Amended Notice of Discovery. |
| 4-29-74 | Filed Affdvt by Anthony J. Davey Deft in support of portion of defts motion brought on by Order to Show Cause for protective Order ret. 6-7-74. |
| 4-29-74 | Filed Deft's Order to Show Cause ret. 6-7-74, 9:30 A.M. |
| 4-29-74 | Filed Deft's Memorandum in support of motion to dismiss complaint and for protective order. |
| 5-28-74 | Filed Deft's Response to Pltff's Request for Production of Documents |
| 5-28-74 | Filed Deft's Answers & Objections to Pltff's Interrogs. |
| -16-74 | Filed Memorandum of Pltff in opposition to Deft's Motion to dismiss. |
| - 2-74 | Filed Deft's Reply Memorandum in support of its motion to dismiss complaint. |

*Docket Entries*

| *Date* | *Proceedings* |
|---|---|
| -20-74 | Filed Memorandum Opinion #41610: Deft. has moved for an order dismissing the complaint for failure to state a claim upon which relief can be granted. Deft's motion is denied. Tenney, J. m/n |
| - 6-75 | Filed Deft's Notice to take deposition of Rodney A. Hawes, Jr. |
| - 6-75 | Filed Deft's Request for production and inspection of documents. |
| -10-75 | Pre-Trial Conference Held by Mag Goettel |
| 14-75 | Filed Stip & Order adjourning motions from 6-7-74 to 8-2-74; pltff shall serve papers in opposition to said motions on counsel for USLife on or before 7-16-74; USLife shall serve reply papers on or before return date; all other discovery shall be adjourned without date, etc. Tenney, J. |
| -15-75 | Filed Stip & Order extending time for deft to answer complaint to 1-23-75, Tenney, J. |
| -21-75 | Filed Opinion #41774. Deft's motion was denied, etc. Accordingly, deft need only 1st claim for relief. Second Claim for relief is dismissed. Tenney, J. So Ordered. Tenney, J. (mn) |
| -24-75 | Filed Answer of Deft. |
| - -75 | Filed Pltff's demand for jury. |
| - -75 | Filed Pltff's Response to Request for Production of Documents. |
| - -75 | Filed Deft's Suppl. Response to Pltff's interrogs. |

*Docket Entries*

| *Date* | *Proceedings* |
|---|---|
| -14-75 | Filed Deft's Affdvt & Notice of Motion for an order dismissing action for failure to join James Rutherford as party to action. ret. 2-24-75. |
| -14-75 | Filed Memorandum in support of deft's motion to dismiss action for failure to join an indispensable party. |
| -26-75 | Filed Memo. End. on motion of 2-14-75. Motion dismissed as moot. CHT |
| -11-75 | Filed deft's Request for Production & inspection of documents. |
| -14-75 | Filed Deft's Answer to Amended Complaint. |
| - 2-75 | Filed deft's notice of motion re: compel production of documents, etc. ret: 5-12-75. |
| - 2-75 | Filed deft's memo. of law in support of motion to compel production of documents. |
| - 2-75 | Filed Deft's Notice of deposition of pltff James Rutherford. |
| -14-75 | Filed Pltffs affdvt & Notice of motion re: order adjourning date on which motion of deft USLife Corp. dated 5-1-75 for an order FRCP 26(c) and 37(a) shall be returnable, etc. ret. 5-23-75, Rm 1904, 9:30 A.M. |
| -13-75 | Filed Pltffs Response to request for production of documents. |
| -21-75 | Filed Affdvt of Joel M. Miller for deft in response to pltffs' motion re: order extending time to serve papers in opposition to deft's 5-1-75 Rule 37 motion. |

*Docket Entries*

| *Date* | *Proceedings* |
|---|---|
| -28-75 | Filed Affdvt of Brendan P. Bovaird for pltffs in opposition to deft's motion to compel pltff "PS&Co" to supply description of privileged documents. |
| -28-75 | Filed Pltffs Memorandum in opposition to deft's motion to compel production of documents & for protective order. |
| 10-19-76 | Bill of Costs as taxed in sum of $2,489.49 in favor of deft against both pl |
| 5-30-75 | Filed Def. Reply Memorandum in support of motion to compel production of douements and for a protective order. |
| 6- 4-75 | Filed Memo End on motion of 5/2/75. Motion referred to Magistrate Raby to hear and report. So Ordered. Tenney, J(mn) |
| 6- 4-75 | Filed Pltffs Note of Issue. |
| 5-29-75 | Pre-trial conference held by Mag. Goettel. |
| 6- 6-75 | Filed Stip & Order that deft's motion for an order dismissing complaint for failure to join an indispensable party is withdrawn; James E. Rutherford permitted to intervene as pltff; complaint amended with enclosed Amended Complaint; deft shall have 20 days from date of entry or order to answer Amended Complaint. Tenney, J |
| 6-10-75 | Filed Deft's Affdvt & Notice of Motion re: striking Notie (sic) of issue & denying pltffs' request for trial preference ret. 6/20/75, Rm. 1905, 9:30 A.M. |

*Docket Entries*

| *Date* | *Proceedings* |
|---|---|
| 6-10-75 | Filed Deft's Memorandum in support of motion to strike pltffs' Note of Issue & denying pltffs' request for trial preference. |
| 6-24-75 | Filed Memo End on motion of 6/10/75. Motion withdrawn per letter to Court dated 6/20/75, a copy of which is annexed hereto together with copy of letter from opposing counsel. So Ordered. Tenney, J(mn) |
| 10-30-75 | Pre-trial conference held by Mag. Goettel. |
| 11-17-75 | Pre-trial conference held by Magistrate Goettel. |
| 11-18-75 | Filed deft's answer. |
| 11-21-75 | Filed Memo End on motion of 5/2/75. Motion referred to Mag. Goettel to hear & determine. BMH Tenney, J (mn) |
| 11-21-75 | Filed Memo End on motion. Having been referred to undersigned for determination and rulings having been made on relief sought upon argument of motion on 11/17/75 said ruling having been duly transcribed by reporter, ordered parties proceed accordingly. So Ordered. Goettel, Mag (mn) |
| 11-25-75 | Filed Pltffs supplresponse (sic) to request for production of documents. |
| 12-10-75 | Pretrial conference held by Mag. Goettel. |
| 12-22-75 | Pre-trial conference held by Mag. Goettel. |
| 2- 9-76 | Pre-trial conference held by Mag. Goettel. |
| 1-12-76 | Pre-trial conference held by Mag. Goettel. |

*Docket Entries*

| *Date* | *Proceedings* |
|---|---|
| 2-26-76 | Filed deft's notice to take deposition of Levering Cartwright. |
| 3-16-76 | Filed Deft's notice to take deposition of E. E. Ballard. |
| 3-31-76 | Filed Deft's notice to take deposition of Tho as W. Carlin. |
| 4-29-76 | Filed Memo end on Report & Recommendation of U.S. Magistrate Bernikow. Motion of deft for leave to take oral deposition of non-party witness in Fla. without the payment of travel expenses & attys fees was referred to Mag. Bernikow for report & recommendation which motion was opposed by pltffs & Magistrate having rendered his report & recommendation on 4/15/76 & Court being fully advised, defts motion be granted as indicated in report of Magistrate. Tenney, J(mn) |
| 4-22-76 | Filed Deft's notice to take deposition of Sandra Pagel. |
| 4- 8-76 | Filed Deft's interrogs to pltff Philo Smith & Co. Inc. |
| 4- 8-76 | Filed Pltff's interrogs to deft (2nd set) |
| 4- 8-76 | (ILLEGIBLE) |
| 5-12-76 | Filed Pltfs Note of issue. |
| 5-10-76 | Filed Defts answers to pltff's 2nd set of interrogs. |
| 5- 6-76 | Filed Pltff Philo Smith & Co. Inc. answer to deft's interrogs. |

*Docket Entries*

| *Date* | *Proceedings* |
|---|---|
| 5- 3-76 | Filed Notice of appearance by attys for deft. |
| 5-23-75 | (recd this date—5/17/76) Memo End on motion of 5/14/75) Motion for an order adjourning return date of motion to 6/2/76 is granted. Pltffs are to serve their papers in opposition on or before 5/28/75. Deft is to serve reply, if ant by 6/1/75. No further adjournments shall be granted. So Ordered. Tenney, J |
| 5- 4-76 | Filed pre-trial conference held by Mag. (illeg.) |
| 10-19-76 | (contd) and added to judgment Clk |
| 10-19-76 | Filed Pltffs. Proposed Questions on Voir Dire. |
| 10-19-76 | Filed Pltffs. Proposed Jury Instructions. |
| 10-19-76 | Filed Pltffs. Trial Memorandum. |
| 10-09-76 | Filed Defts'. Requested Jury Instructions. |
| 10-09-76 | Filed Defts'. Suggestions for Voir Dire. |
| 10-09-76 | Filed Defts'. Trial Memorandum. |
| - 3-76 | Filed Defts. Supplemental Pretrial Memorandum. |
| - 4-76 | Jury Trial begun before Judge Tenney. |
| - 5-76 | Jury Trial Con't before Judge Tenney. |
| - 6-76 | Jury Trial Con't before Judge Tenney. |
| - 7-76 | Jury Trial Con't before Judge Tenney. |
| -10-76 | Jury Trial Con't and Concluded before Judge Tenney. |

*Docket Entries*

| *Date* | *Proceedings* |
|---|---|
| - 4-76 | Filed Opinion # 45150. For reasons stated, deft's motion for directed verdict is granted and judgment is entered for deft. So ordered. Tenney, J (mn) |
| - 6-76 | Filed Judgment. Ordered that deft. have judgment against pltffs dismissing complaint. Clk. |
| -19-76 | Filed Bill of Costs in sum of $2,489.49 in favor of deft. docketed as Judgment # 76,934. |
| -01-76 | Filed Pltff's Notice of Appeal from each & every part of final judgment entered in favor of deft. USLife Corporation on 9/30/76 and from each & every part of action on 9/24/76 ordering that deft's motion for a directed verdict be granted and judgment be entered for deft (mailed copy to Ull an Van Ginkel & Sullivan & Cromwell Esqs on 11/3/76) |
| - -76 | Filed 9-14-76, 15, 16, 17 & 20 |
| -05-76 | Filed Undertaking for costs on appeal in sum of $50.00 (National Surety Company) |
| -16-76 | Filed Plaintiff's designation of exhibits to the USCA |
| -29-76 | Filed consent pre-trial order. Tenney, J. |
| -24-76 | Filed Notice that original record on appeal has been certified and transmitted to USCA, 2nd Circuit. |
| -24-76 | Fld Notice that 1st Suppl. record on appeal has been certified and transmitted to USCA, 2nd Circuit. |

## Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 1280 (CHT)

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PHILO SMITH & COMPANY, INC. and
JAMES E. RUTHERFORD,

Plaintiffs,

—against—

USLIFE CORPORATION,

Defendant.

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Plaintiffs Philo Smith & Company, Inc. and James E. Rutherford, by their attorneys Dewey, Ballantine, Bushby, Palmer & Wood, for their Amended Complaint in this action, allege the following:

1. This Court has jurisdiction of this controversy pursuant to 28 U.S.C. § 1332. There is diversity of citizenship between the parties, and the amount in controversy exceeds $10,000 exclusive of interest and costs.

2. Plaintiff Philo Smith & Company, Inc. ("PSCO") is a corporation organized and existing under the laws of the State of Connecticut with a principal place of business at 460 Summer Street, Stamford, Connecticut; is a member of the National Association of Securities Dealers, Inc.; and is a member of the Midwest Stock Exchange.

3. At all times relevant to the Complaint in this action, PSCO, its employees, and its agents engaged, among other things, in the business of finding opportunities for business entities to enter into a variety of transactions, including mergers, acquisitions, and similar business transactions.

4. Plaintiff James E. Rutherford ("Rutherford") is a citizen of the State of Illinois, who resides at 219 East Lake Shore Drive, Chicago, Illinois and maintains a business office at 1860 Insurance Exchange Building, 175 West Jackson Boulevard, Chicago, Illinois.

5. At all times relevant to the Complaint in this action, Rutherford has engaged, among other things, in the business of finding opportunities for business entities to enter into a variety of transactions, including mergers, acquisitions, and the sale and purchase of the assets or stock of a business.

6. On information and belief, defendant USLIFE Corporation ("USLIFE") is a corporation organized and existing under the laws of the State of New York with a principal place of business at 125 Maiden Lane, New York, New York.

7. On information and belief, All American Life & Financial Corporation ("All American") is a corporation organized and existing under the laws of the State of Delaware with a principal place of business at 8501 West Higgins Road, Chicago, Illinois.

8. In the Winter and Spring of 1971, Rodney Hawes ("Hawes"), an employee of PSCO, and E. E. Ballard ("Ballard"), an officer of All American, engaged in discussions in which Hawes stated that he could introduce

All American to other companies which would be interested in acquiring All American.

9. Hawes identified several companies for Ballard, and among the companies which Hawes specifically named was USLIFE.

10. In June of 1971, Ballard asked Hawes to arrange a meeting between All American and USLIFE for the purpose of discussing an acquisition of All American by USLIFE.

11. Later in June of 1971, Hawes met with Gordon E. Crosby, Jr. ("Crosby"), an officer of USLIFE, and told Crosby the fact that an opportunity existed for USLIFE to acquire All American.

12. Crosby asked Hawes to arrange a meeting between USLIFE and All American and promised to pay PSCO a fee if a business transaction resulted.

13. On July 8, 1971, representatives of PSCO and USLIFE signed a written agreement (the "1971 Agreement") fixing the fee to be paid to PSCO as compensation for its services as the finder of the proposed transaction.

14. The 1971 Agreement contained the following provision:

> "Our commitment under this letter shall expire if we and All American Life and Financial Corporation do not enter into an agreement in principle looking towards an acquisition of said company by June 30, 1972."

Prior to executing the 1971 Agreement, Hawes told Crosby he did not want this provision in the 1971 Agreement because any transaction between USLIFE and All American could not be negotiated and consummated within the specified period of time.

15. Crosby told Hawes that the 1971 Agreement would be extended if the specified period of time expired while USLIFE was still interested in the transaction.

16. Prior to this time, Hawes had met with Rutherford to enlist Rutherford's aid in bringing about a meeting between USLIFE and All American.

17. In reliance on the 1971 Agreement and on Crosby's representation that it would be extended under certain circumstances, Hawes and Rutherford arranged a meeting between Crosby and Ballard.

18. During the Fall of 1971 and as a direct result of Hawes' and Rutherford's efforts, officers of USLIFE and All American met to discuss a possible acquisition of All American by USLIFE.

19. In June and July, 1972, Rutherford and representatives of PSCO and USLIFE entered into an agreement in writing (the "1972 Agreement") to extend the 1971 Agreement for the payment of a fee to PSCO and to add Rutherford as a party to the agreement.

20. The 1972 Agreement contained the following provision:

> "First Party's obligation hereunder shall expire if it and All American Life and Financial Corporation do not enter into an agreement in principle

on or prior to December 31, 1972 looking towards the acquisition of said corporation."

Prior to executing this Agreement, Hawes advised Crosby that the specified period of time should run until at least June 30, 1973, because no transaction could be arranged before December 31st, 1972.

21. Crosby told Hawes that the 1972 Agreement would be extended if the specified period of time expired while USLIFE was still interested in the transaction. Similar representations were made to Rutherford by Crosby.

22. On information and belief, discussions and negotiations between All American and USLIFE for an acquisition of All American by USLIFE continued throughout 1972 and part of 1973.

23. In the first part of 1973, USLIFE and All American reached an agreement in principle for the acquisition of All American by USLIFE. This agreement in principle did not result in a transaction.

24. In the middle of 1973, USLIFE and All American announced another agreement in principle for the acquisition of All American by USLIFE.

25. The second agreement in principle resulted in a transaction between USLIFE and All American which was consummated on or about February 25, 1974.

26. All conditions precedent to the duty of USLIFE to pay the finder's fee fixed by the Agreements of 1971 and 1972 have been fully performed or have occurred.

27. PSCO has demanded that USLIFE pay the compensation specified by the 1972 Agreement, but USLIFE has refused to make payment.

WHEREFORE, plaintiffs demand judgment for the sum due them under the 1972 Agreement, plus interest; and any other relief this Court deems just and proper, together with the costs of this action.

Dated: New York, New York
March 14, 1975

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
By RUSSELL H. BEATIE, JR.
(a member of the firm)
Attorneys for Plaintiffs,
140 Broadway,
New York, New York, 10005.
Tel. No. (212) 344-8000

## Answer to Amended Complaint

[SAME TITLE]

Defendant USLIFE Corporation, by Sullivan & Cromwell, its attorneys, for its answer to the Amended Complaint herein alleges:

1. Denies each and every allegation of paragraph 1 of the Amended Complaint.

2. Avers that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 2, 3, 4 and 5 of the Amended Complaint.

3. Admits the allegations of paragraphs 6 and 7 of the Amended Complaint.

4. Avers that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 8, 9 and 10 of the Amended Complaint.

5. Admits the allegations of paragraph 11 of the Amended Complaint.

6. Denies each and every allegation of paragraph 12 of the Amended Complaint, except admits that Crosby asked Hawes to arrange a meeting between defendant and All American Life & Financial Corporation ("All American").

7. Denies each and every allegation of paragraph 13 of the Amended Complaint, except admits that on or about July 8, 1971 plaintiff Philo Smith & Company, Inc.

("Philo Smith") and defendant executed a written agreement, a copy of which is annexed hereto as Exhibit A, and respectfully refers to said July 8, 1971 agreement for its full terms and effect.

8. Denies each and every allegation of paragraph 14 of the Amended Complaint, except refers to said July 8, 1971 agreement for its full terms and effect.

9. Denies each and every allegation of paragraph 15 of the Amended Complaint.

10. Avers that it lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the Amended Complaint.

11. Denies each and every allegation of paragraph 17 of the Amended Complaint.

12. Denies each and every allegation of paragraph 18 of the Amended Complaint, except admits that during the Fall of 1971 officers of defendant and All American met to discuss a possible acquisition of All American by defendant.

13. Denies each and every allegation of paragraph 19 of the Amended Complaint, except admits that on or about June 26, 1972 plaintiffs and defendant executed a written agreement, a copy of which is annexed hereto as Exhibit B, and respectfully refers to said June 26, 1972 agreement for its full terms and effect.

14. Denies each and every allegation of paragraph 20 of the Amended Complaint, except refers to said June 26, 1972 agreement for its full terms and effect.

15. Denies each and every allegation of paragraphs 21 and 22 of the Amended Complaint.

16. Denies each and every allegation of paragraph 23 of the Amended Complaint, except admits that (i) defendant and All American reached an agreement in principle during June, 1973 for the acquisition of All American by defendant, and (ii) said agreement in principle did not result in a transaction.

17. Denies each and every allegation of paragraph 24 of the Amended Complaint, except admits that on or about September 18, 1973 defendant and All American announced another agreement in principle for the acquisition of All American by defendant.

18. Admits the allegations of paragraph 25 of the Amended Complaint.

19. Denies each and every allegation of paragraphs 26 and 27 of the Amended Complaint, except admits that defendant has refused to make payment to plaintiffs because no such payment is owed.

AS AND FOR ITS FIRST SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

20. The Amended Complaint fails to state a claim upon which relief can be granted.

AS AND FOR ITS SECOND SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

21. This action is barred by the applicable statute of frauds, New York General Obligation Law § 5-701(10).

As and for its Third Separate and Complete Affirmative Defense, Defendant Alleges:

22. On or about June 26, 1972 plaintiffs and defendant entered into a written agreement which provided that defendant would pay plaintiffs "collectively" a finder's fee if defendant acquired All American and so long as an agreement in principle looking toward such acquisition was entered on or prior to December 31, 1972.

23. Prior to December 31, 1972, plaintiff Philo Smith interested All American in the acquisition of another company, thereby obtaining a finder's fee with respect to such acquisition, and by so doing discouraged All American from being acquired by defendant.

24. Having impeded defendant's acquisition of All American, plaintiffs may not recover a finder's fee with respect to such acquisition which occurred despite said acts.

As and for its Fourth Separate and Complete Affirmative Defense, Defendant Alleges:

25. On or about July 8, 1971 plaintiff Philo Smith and defendant entered a written agreement which provided that defendant would pay plaintiff Philo Smith a finder's fee if defendant acquired All American, and so long as an agreement in principle looking toward such acquisition was entered by June 30, 1972.

26. Defendant repeats and realleges paragraph 22.

27. Defendant and All American did not enter an agreement in principle looking toward such acquisition

prior to December 31, 1972, and all negotiations between defendant and All American ceased prior to December 31, 1972.

28. Defendant's acquisition of All American resulted from meetings and negotiations which commenced anew in May 1973, without any aid by plaintiffs.

29. During June 1973 defendant and All American entered an agreement in principle which did not result in the acquisition of All American by defendant, but following a second agreement in principle entered into during September 1973 defendant acquired All American on February 25, 1974.

30. Pursuant to the written agreement between plaintiffs and defendant, plaintiffs are not entitled to a fee with respect to defendant's acquisition of All American because (i) no agreement in principle looking toward such acquisition was entered on or prior to December 31, 1972, and (ii) plaintiffs did not procure defendant's 1974 acquisition of All American.

AS AND FOR ITS FIFTH SEPARATE AND COMPLETE AFFFIRMATIVE DEFENSE, DEFENDANT ALTERNATIVELY ALLEGES:

31. Even if defendant's officer made the statements alleged in paragraphs 15 and 21 of the Amended Complaint, defendant is not thereby estopped from asserting the statute of frauds as a complete defense to this action, because in reliance on either or both of said alleged statements (i) plaintiffs did not act to their detriment, and (ii) plaintiffs took no steps following entry of the June

26, 1972 written agreement to bring about the acquisition by defendant of All American.

WHEREFORE, defendant demands judgment dismissing the Amended Complaint, plus its costs of this action, and such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 14, 1975

SULLIVAN & CROMWELL
By: EDWARD W. KEANE
Attorneys for Defendant,
48 Wall Street,
New York, New York 10005.
(212) 952-8100

**Exhibit A, Annexed to Foregoing Amended Complaint (Written Agreement Between Philo Smith and USLIFE Corporation, dated July 8, 1971)**

(ILLEGIBLE)

July 8, 1971

Philo Smith & Co., Inc.
469 Summer Street
Stanford, Connecticut

Attention: Mr. Rodney A. Hawes, Jr.

Reference: All American Life & Financial Corporation

Gentlemen:

To confirm my discussion with Mr. Hawes, who has brought to our attention All American Life & Financial Corporation, we understand that your "finder's fee" in the event we acquire said company would be 5% of the first million dollars of value given, 1% on the second through the fiftieth million of value given, and ½% on value given above $50 million. We are agreeable to such an arrangement provided that in no case would we pay more than 1% of total value given, and no payment shall be made unless the acquisition is consummated.

Our commitment under this letter shall expire if we and All American Life and Financial Corporation do not enter into an agreement in principle looking towards an acquisition of said company by June 30, 1972.

*Exhibit A, Annexed to Foregoing Amended Complaint*
*(Written Agreement Between Philo Smith and*
*USLIFE Corporation, dated July 8, 1971)*

If the foregoing is agreeable to you, please so indicate by signing and returning the enclosed copy of this letter.

Very truly yours,

(ILLEGIBLE)

Accepted, July 8, 1971

PHILO SMITH & Co., INC.
By: Rodney A. Hawes, Jr.
RODNEY A. HAWES, JR.

(ILLEGIBLE)

## Exhibit B, Annexed to Foregoing Amended Complaint (Written Agreement, dated June 26, 1972)

FEE AGREEMENT

Agreement, dated June 26, 1972, among USLIFE Corporation ("First Party"), Philo Smith & Co., Inc. ("Second Party") and James Rutherford ("Third Party").

WITNESSETH:

In view of the covenants and representations herein contained, the Parties agree as follows:

1. If First Party shall acquire All American Life and Financial Corporation, it shall pay to Second Party and Third Party collectively a cash sum equal to (i) 5% of the first million dollars of value given, (ii) 1% on the second through the fiftieth million of value given plus (iii) ½% on value given above $50,000,000; but in no event shall First Party pay more than 1% of total value given. "Value given" shall mean the fair market value of the consideration actually paid by First Party on the day the acquisition is consummated.

2. The payment herein set forth is the sole payment in respect of the transaction that First Party shall make to Second and Third Parties collectively. Second and Third Parties shall make their own arrangement as to the division of such payment between them, as to which First Party shall not be a party; and Second Party and Third Party shall individually hold First Party harmless against claims made by the other which exceed First Party's obligation hereunder. Second and Third Parties shall give First Party a copy, executed by both, of such arrangement.

*Exhibit B, Annexed to Foregoing Amended Complaint*
*(Written Agreement, dated June 26, 1972)*

3. First Party's obligation hereunder shall expire if it and All American Life and Financial Corporation do not enter into an agreement in principle on or prior to December 31, 1972 looking towards the acquisition of said corporation.

4. This Fee Agreement is in part an extension of First Party's agreement with Second Party dated July 8, 1971.

USLIFE Corporation
By (ILLEGIBLE)
Chairman

Philo Smith & Co., Inc.
By Rodney A. Hawes, Jr.

James Rutherford

## Excerpts from Transcript of Proceedings

[SAME TITLE]

September 14, 1976
11:30 a.m.

BEFORE:

HON. CHARLES H. TENNEY,
*District Judge.*

*Appearances*:

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, ESQS.
Attorneys for plaintiffs,
RUSSEL H. BEATIE, ESQ., and
BRENDAN P. BOYAIRD, ESQ.,
Of Counsel

SULLIVAN & CROMWELL, ESQS.
SUSAN J. MCCONE, ESQ.,
Of Counsel

—and—

ULLMAN, VAN GINKEL, ESQS.
JOEL M. MILLER, ESQ.,
Of Counsel

—and—

ANTHONY J. DAVEY, ESQ.
Attorneys for defendant

* * *

*Rodney Hawes—for Plaintiffs—Cross*

(44)* RODNEY HAWES, called at a witness after first having been duly sworn, testified as follows:

* * *

(81) *Cross examination by Mr. Miller*:

* * *

(98) Q. What did you do after the conversation? A. Picked up the phone and called Mr. Crosby.

Q. What did you say to Mr. Crosby? A. I said that—

Mr. Beatie: Excuse me, your Honor. We have been all through this.

Mr. Miller: Your Honor, this is a crucial point. I think I am entitled to explore on my examination what was said.

The Court: Yes. Proceed.

Q. Do you have the question in mind, sir? A. I believe so.

Q. The court reporter will be glad to read it back (99) so you understand exactly what's been asked. A. You asked me what I had said to Mr. Crosby, I think.

I said that we, meaning Philo Smith & Company, had been doing some work on acquisitions for Mr. Ballard, and that I was personally acquainted with him, and that he had just called me and suggested that he was willing to meet with Mr. Crosby about All American.

And Mr. Crosby then said that Mr. Rutherford had introduced him to Mr. Ballard some two or three years before. I believe he said '68. But that the time had been

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* Figures in parentheses refer to each new page of the Stenographic Transcript.

sufficient that he didn't feel that he had an obligation to Mr. Rutherford.

I then said, "Well, that was okay, because Mr. Ballard had asked us to work with Mr. Rutherford."

He then said, that a Wall Street brokerage firm had recently suggested that USLIFE might, or that All American might be interested in talking to USLIFE, but that they had been, after an initial seemingly positive reaction, had not been able to deliver an appointment, or I do not remember the phrase that was used, but at that point they had not anything in the way of accomplishing something.

He said "It is a little awkward at this point since they have so recently been here; it would be helpful (100) if you would be able to get a letter from Mr. Ballard which demonstrates that indeed you are able to provide the meeting."

I said, "I will be very happy to get a letter of authorization from Mr. Ballard and will do so," and did.

Q. You told him that you had been working on acquisitions with Mr. Ballard. Was that a correct statement? A. Yes, sir.

Q. What acquisitions had you worked on with Mr. Ballard? A. He asked me to check out LaMar Life and I had made a trip to Texas and talked to the Murchinsons, Mr. Murchinson, Clint Murchinson, who owned a controlling interest in LaMar Life at that time and reported back to him.

Q. How long had your meeting been with Mr. Ballard? A. How long?

Q. How many meetings did you have at that point? A. By June the 8th, two or three.

Q. Isn't it two? A. I said two or three.

Q. An April meeting and a meeting in May, Mr. Hawes? A. You know I believe so. You asked me what I remember, and I—

(101) Q. How long were each of those meetings? A. The first meeting was a couple of hours, I guess.

The second meeting was a fairly short meeting.

Q. On that basis— A. Maybe an hour. I don't know, I don't remember.

Q. On that basis, you said you had been working on acquisitions with Mr. Ballard, is that right? A. That is a true statement.

Q. Did you tell Mr. Crosby you had the key to this acquisition? A. Which was Mr.—I don't remember that phrase, but certainly Mr. Ballard, at that time I felt Mr. Ballard was the key to the acquisition.

Q. Did you tell Mr. Crosby in words or in substance that Philo Smith & Company was financial advisers to All American? A. No, sir.

Q. Was Philo Smith & Company financial advisers? A. No, sir.

Q. Did you have an understanding as to what you were to do after your phone call with Mr. Crosby? A. Yes, I believe so. To get a letter from Mr. Ballard saying that he would meet with Mr. Crosby.

(102) Q. But under that you were to do anything further, for example, set up a meeting? A. Not at that point; I don't believe so.

Q. Did you understand that getting the letter would be a crucial step in the possible acquisition? A. I assumed it would be very important, yes.

Q. And you went ahead and did it, did you not? A. I had Mr. Rutherford actually obtain the letter, but yes, we did.

Q. And you did that before you had anything in writing from Mr. Crosby, is that right? A. Yes, sir.

Q. In fact, you did it before you had ever discussed the fee with Mr. Crosby, is that right? A. Yes. He said we had taken care of that if I could deliver the letter.

Q. Now, you didn't tell us that when you first discussed the conversation, did you? A. I don't believe I did.

Q. But now you are telling it to us? A. Well, you asked me so I told you.

Q. I see. You didn't describe the whole conversation, just part of it before. Now you are adding to it. A. Well as I remember it, yes, sir.

(103) Q. Would you tell us how you went about getting the letter from Mr. Ballard? A. I went out to see Mr. Rutherford and we visited—about what had happened up to that point, and Mr. Rutherford called Mr. Ballard and made a luncheon appointment to see him the next day.

And the rest of it Mr. Rutherford did.

Q. Did there come a time when Mr. Rutherford informed you that he had received a letter from Mr. Ballard? A. Yes.

Q. How did he so inform you, do you remember? A. I believe he sent me a letter. I might say first that we talked on the phone and he informed me that a letter was coming, and then when the letter came he mailed it to me or had it mailed to me.

Q. Did Mr. Rutherford at that time tell you anything about getting a written agreement from Mr. Crosby? A. Well, at the time we had our meeting he suggested that we get a written agreement.

Q. So Mr. Rutherford knew at that time that there was no written agreement, did he not? A. Oh, yes, sir.

Q. Nonetheless, he was willing to go to Mr. Ballard and get the letter? (104) A. Of course.

Q. And he did so, didn't he? A. Yes.

Q. Did he send you a letter from Ballard with a letter of his own; do you remember? A. Yes, I do.

Q. Do you remember the dates? A. No, I do not. I cannot say that I remember the date of the letter.

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*Rodney Hawes—for Plaintiffs—Cross*

(108) [HEARING OF SEPTEMBER 15, 1976]

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(123) Q. Mr. Hawes, on the 16th of June you had no fee agreement with Mr. Crosby, did you? A. On the 16th of June?

Q. Yes. A. No, I did not.

Q. In fact, you hadn't even discussed the amount of the feet at this point? A. We had not.

Q. Mr. Rutherford had no fee agreement with Mr. Crosby, did he? A. Not to my knowledge, no.

• • •

(128) Q. You went in to see Mr. Crosby and tell me what happened at that meeting? A. Would you like me to tell you what was said at all the meetings?

Q. Please, if you remember. A. The first thing that happened, Mr. Crosby described his Eastern Life acquisition which had just been announced.

Then I described to him the Sun Life acquisition which we had just announced that week. In fact that is the one I referred to a minute ago, one of the two that we were very much involved with. That was some $70 million or so.

We talked about that some of the Wall Street people were concerned that he paid too much for Eastern Life. He explained why that was not so, because of the ecomomies and so forth.

I then showed him the letter from Mr. Ballard and Mr. Rutherford's letter, which had some explanation as we have just seen about his getting the letter from Mr. Ballard.

I also described to him my first meeting with Mr. Ballard where everyone that comes into Mr. Ballard's

office, that he had a painting on the wall with the family around the fireplace and he has a story that he tells everybody that comes in to his office and you hear it every time you go into (129) his office.

And Mr. Crosby indicated that, yes, he understood that Mr. Ballard was—I don't remember the words used—but certainly taken for a lot of verbiage and long talks.

He described—I don't know, let's see—I am not sure I have all the sequence of events exactly.

Q. The sequence is of importance so could I ask you to be very careful to remember the sequence if you can, as it happened. Give us your best testimony. A. I had mentioned to Mr. Crosby that we had been, meaning Philo Smith which essentially meant me, had been working with Mr. Ballard in the acquisition area and because of that I had become personally acquainted with him and that he had asked me to—let's see—trying to put it all in the right sequence is difficult.

We at some time determined, yes, Mr. Crosby was interested in going forward and I said, well, one of us, and I frankly don't know which one, brought up the fee agreement. I think I did.

Q. Let me interrupt you there because I want to be clear about this.

Before you discussed the fee agreement, isn't it a fact that Mr. Crosby asked you to set up a meeting and you agreed to do so? (130) A. I believe that is the sequence.

Q. All right. Continue. So you had a conversation in which you talked about Eastern Life and Mr. Ballard and your own transaction and gave him the letter of Mr. Ballard, did you? A. I believe I showed him one, yes.

Q. That is the sequence, isn't it? A. I believe so.

Q. All right. That is what you told me when I took your deposition? A. Mr. Rutherford's letter also.

Q. You gave him Mr. Rutherford's letter also. He asked you to set up a meeting and you agreed to do it? A. Right.

Q. And that happened before you talked about fee? A. Yes. It is not unusual.

Q. When you went on to talk about the fee what was said about it. You can leave out the numbers if you want to. I don't think the numbers are significant for this purpose? A. I don't really recall. He said we need to talk about the fee, I or he did. But in any event I think he said, "What would you suggest?"

I said "You are familiar with the Lehman formula", and I think the numbers are significant in terms of the (131) conversation because it was five percent on the first million, four percent on the second, three percent, two percent, one percent and Mr. Crosby said, "We never pay over one percent."

I said, "Why is that?" And then he described that because they were very experienced in acquisitions, they completed something like 20 plus, formations or acquisitions in the past few years, they had their own acquisition term which he described very proudly and named some names. I was not familiar with any of them.

I said, "Well, in a transaction of this size, since it will be around $100 million, we have an agreement with Kaufman and Broad people, and we propose to use the same one."

He said "What is that?"

"Five percent on the first million, one percent on two to fifty and one half percent after that."

He thought about it a minute and determined that that would be fine as long as it was not over one percent.

* * *

(140) Q. You talked to Mr. Rutherford, did you not, the next day? A. Yes, I did.

Q. Tell me what you told Mr. Rutherford. A. I referred to the meeting told him that I had received the agreement, and, I don't know, we chatted back and forth about making an appointment with Mr. Ballard.

Q. Is that it? A. At the moment that's the best I can recall.

Q. Mr. Rutherford was your partner, wasn't he? A. Well, he was to be involved in the case, yes.

Q. And he was getting a 50 percent split, was he not? A. Yes, sir.

Q. So he had an interest equal to your company's interest. A. Yes, sir.

Q. It made a difference to him when this deal was completed and when the interest in principle was entered, didn't it? A. I think it mattered most if it would be completed and whether or not we had been paid.

(141) Q. You didn't tell Mr. Rutherford about Mr. Crosby's promise to extend it if he was still interested, did you? A. I don't recall discussing it at that time.

Q. Did you ever tell Mr. Rutherford about that? A. About the July 8th meeting?

Q. Yes, about Mr. Crosby's promise to extend the agreement if he was still interested. A. The following—yes, we did, the following year, when it came time to extend it and we did.

Q. When did you tell him that? A. I believe when I met with him in early June, '72.

Q. Let us keep that in mind, Mr. Hawes. It is an important point. Let me look at what you told me in December. Page 175 of the transcript from last December:

> "Q. Did Mr. Rutherford tell you at that time or at any earlier time that he had had a conversation

with Mr. Crosby about an extension of the agreement?

"A. Not that I recall.

"Q. He never told you that Mr. Crosby had talked to him about extending the agreement?

"A. I don't recall that.

"Q. Did you ever tell Mr. Rutherford about your conversations with Mr. Crosby that you testified about today in which you said Mr. Crosby said he would extend the (142) agreement if he was still interested?

"A. I don't recall talking to him about it, no."

• • •

(152) Q. That was your understanding at the time, wasn't it, Mr. Hawes, that if the agreement in principle was entered before June 30, '72, you would split the fee with Mr. Rutherford? A. Certainly.

Q. You didn't tell Mr. Rutherford that maybe that date would be extended, did you? A. At the time it wasn't particularly relevant.

Q. He was your partner, but you didn't tell him? A. Didn't tell him what? Pardon me?

Q. He was your partner but you didn't tell him? A. I assumed we had an agreement that Mr. Crosby would honor and he was my partner. I wasn't used to having a problem of that type—

Q. Mr. Hawes— A. —and at that time it wasn't a problem.

• • •

(175) Q. Isn't what you did from then on, Mr. Hawes, to interest Gardiner in General United so that that acquisition was announced at the end of '71 and it really im-

peded and thwarted the acquisition by USLIFE of All American?

• • •

(176) A. The answer is no, they do not.

Q. Let us take it up one step at a time, Mr. Hawes. Was the acquisition by All American of General United announced at the end of December, 1971? A. I understood it was, yes.

Q. Weren't you the finder on that acquisition? A. Absolutely.

Q. Didn't you receive a fee on that acquisition? A. Certainly did.

Q. How much did you receive? A. Me personally or the firm?

Q. Let us start with the firm. A. The firm fee received was—you will have to check the record—I believe it was 239,000 or 236,000 or 240,000. I don't remember the number.

Q. Let's explain to the jury because this is not a (177) typical situation, I think, and I want them to understand it was a two-step transaction.

First of all, what did All American buy? A. They bought the 78 percent voting interest, and please don't nail me down to the number—we will have to check that.

Q. Your memory is quite good. A. Okay, 78 percent of the voting stock, which was controlled by a company in New York, at that time known as Equity Corp., I think.

Q. Sometimes called Wheelabrator-Frye? A. It is today, yes.

Q. And that acquisition was announced on December 29, '71, Philo Smith & Company received a fee of $239,000? A. When the deal was closed, yes.

Q. Of that fee, you received how much personally? A. It is in the record. I gave that to you before. I don't

recall. It is 50-some thousand, I think, but I don't remember.

Q. Would you say $58,096.82 is right? A. If you say so, that would be close.

The Court: I am not sure how relevant this is on the basis on which this is being received by me.

Q. As announced, All American had an obligation to (178) offer for the remaining 22-odd percent of the stock, did they not? A. Yes, they had 18 months in which to do that.

Q. And they finally did it, didn't they? A. Yes, they did.

Q. When did they do it? A. In 1973.

Q. What month? A. I believe it was concluded in May.

Q. If I said April, would you think that sounded right? A. I really don't recall. In the spring some time.

Q. Okay.

Did you get a further fee on that acquisition? A. Yes, we received $36,000.

Q. How much did you personally receive? A. $26,000.

Q. So you personally received some $84,000, did you not? A. Yes, sir.

Q. And the company received 239 plus 36, right? A. Yes, sir.

Q. Was Mr. Gardiner in a position to be acquired during the period—let's take it by steps—during the (179) period up to the end of 1971 while he was interested in General United? A. He did not feel so, no.

Q. Then he announced the acquisition at the end of '71, right? A. Yes.

Q. It took him a few months to complete that first phase, the 78 percent, did it not? A. Yes; I can't remember when it was but—

Q. During that period that he was completing the first phase, that is from the 29th of December until the period in 1972, when that first phase was completed, he wasn't in a position to be acquired, was he? A. I don't believe so. I believe he would have been in registration, although I'm not sure that is the proper term.

Q. I am not asking for legal conclusions. Did Mr. Gardiner tell you he wasn't interested in being acquired during that period? A. Yes. I said—I am a little fidgety here. When I say yes, then the next thing you ask me is what was the conversation, and I can't remember, but he was not—

Q. If I am going too fast for you, you just slow me down. (180) A. Let's slow down.

Q. We are here to get the facts. I am not trying to confuse or mislead. I want the facts. Certainly I would like to get this trial done in an expeditious period of time, but if I am pushing you too fast, please tell me. A. Please slow down a little bit.

Q. After the first block, the 78 percent block was acquired, Mr. Gardiner still had an obligation to buy the other 22 percent, did he not? A. Yes, he did.

Q. What was Mr. Gardiner's view during that period from early in '72 until April '73 when he finally did buy that second block as a possibility of All American being acquired by anyone? A. His feeling was that it could not be acquired by anyone until he had finished his obligation to buy the rest of the shares.

Q. So let me see whether we can summarize it, and I will try it and you tell me if I am saying it fairly.

From '71, October '71, when you first mentioned General United to him, until April '73, because of the General United transaction, Mr. Gardiner was not in a position, in his belief, to be acquired by USLIFE, is that correct? A. I believe that is correct.

Q. Did Mr. Crosby during that same period of time (181) make efforts to stay close to Mr. Gardiner? A. I believe he did.

Q. Why did he do that, do you know? A. So that at an appropriate time that he would be in a position to be the one to acquire All American.

Q. Did you help him in those efforts? A. After the relationship was established, the strategy was as agreed upon by me and Mr. Crosby that he was on his own at that point, he had to establish the personal relationship and at the proper time he would be able to take advantage of that relationship.

Q. So from October 1, 1971 on Mr. Crosby was on his own, was he? A. Pretty much.

Q. He didn't need you anymore, did he? A. No.

Q. Remember what Mr. Rutherford said when the General United transaction was announced? A. I remember some discussion with Mr. Rutherford, yes.

Q. Let's be sure we have the facts right.

Mr. Rutherford was your partner on All American-USLIFE, wasn't he? A. Yes.

(182) Q. How much of the fee did he get in General United? A. He was not a partner, so he did not receive any fee.

Q. What did he say about that? A. He was not happy about that.

Mr. Beatie: Objection, your Honor.

The Court: I will allow it. I will overrule the objection.

Q. I'm not sure I heard that answer. A. Well, excuse me.

Q. It wasn't your fault, the objection came the same time. A. Read where we were then.

*Rodney Hawes—for Plaintiffs—Cross*

(Record read.)

Q. Wasn't he more than just unhappy; do you remember? A. He was very unhappy. He felt that he should have been entitled to part of the fee on the General United thing. I tried to explain to him that our relationship was between—was if USLIFE bought All American, that if I sold another company to USLIFE, then we would not share in that fee or if he sold another company to USLIFE, I would not share in that fee or if he sold a company to All American, I would not share in that fee and if I sold another company to All American then he would not share in that fee.

(183) Q. Did you convince him? A. I doubt it.

Q. You haven't convinced him to this date, have you? A. I would doubt it, yes.

* * *

(185) Q. Now, you had a lot of conversations with Gardiner in 1972, didn't you? A. Yes, sir.

Q. During those conversations you mentioned a number of companies to Gardiner, didn't you? A. Yes, sir.

Q. They were both companies that Gardiner might acquire and companies that might acquire All American? A. 1972? Many companies that I think—the answer to the question is yes.

* * *

(199) Q. Let us go back to the next agreement, the second agreement that you entered with USLIFE Corporation.

That puts us in June of 1972, does it not? A. Yes.

Q. This is just so we are all together here. The first agreement had a date which terminated what date? A. The end of June 1972.

Q. If the agreement in principal was not entered into by June 30? A. I think so.

Q. But you knew in early June 1972 that agreement had that termination? A. I knew it from the year before.

Q. Did you talk to Mr. Crosby about an extension? A. Yes, I did.

Q. Do you remember when you did that? A. The date June 8 I recall you and I talked about before. I think that is correct.

Q. In a face to face meeting with Mr. Crosby? A. Yes, it was.

Q. What was said? A. The exact words?

(200) If you can remember them. A. I am afraid I can't.

In substance we talked about his continued interest in All American and did he have a continued interest and, yes, he did.

We talked about the fact that Mr. Gardiner could not, at least felt he could not, make any deal until he picked up the minority shares of General United which could not take place until after the first of the year.

He said sure he would have something sent out. We then discussed another insurance company I was offering as a possibility, at least to Mr. Crosby as I had done—

Q. I ask you not to go into that. A. All right.

Q. All the conversation about All American. A. I am sorry, I thought you asked me about the meeting. I was trying to comply.

Q. I just ask you not to go into that other. A. All right.

Q. Did Mr. Crosby send you something? A. Yes.

Mr. Miller: I will ask the clerk to mark this as the next exhibit for identification, a two page document.

(Defendant's Exhibit K marked for identification.)

(201) Q. Would you look at Defendant's Exhibit K for identification and tell me if that is what you received from Mr. Crosby? A. Yes, this is a copy.

Mr. Miller: I would like to offer in evidence.
Mr. Beatie: No objection, your Honor.
The Court: Received.

(Defendant's Exhibit K for identification received in evidence.)

Mr. Miller: With your permission I would like to pass three copies of this exhibit to the jury now.

(Handed to jury.)

Q. Mr. Hawes, Exhibit K enclosed a draft agreement, did it not? A. Yes.

Q. The draft agreement had been signed by Mr. Crosby on behalf of USLIFE Corporation had it not? A. I believe so.

Q. Let me give you the exhibit back so you will have it while I am asking you these questions. A. Yes.

Q. I would like you to tell me what you understood to be the differences between this draft agreement and the agreement you signed with Mr. Crosby on July 1971.

(202) First of all, were the parties the same or different. A. I am not I understand what you mean.

Q. Who were the parties to the agreement that you signed with Mr. Crosby on July 8, 1971? A. Philo Smith and Company and USLIFE.

Q. Who were the parties to be in the agreement which Mr. Crosby sent you with the letter of June 19, exhibit K? A. It asked for two signatures, Philo Smith and Company and Mr. Rutherford.

Q. Now instead of having an agreement between two parties Mr. Crosby was proposing an agreement between three parties, was he not? A. Evidently. I didn't know there was a difference.

Q. Did that bother you at all? A. No, not at all.

Q. Because you were a partner of Mr. Rutherford? A. Yes.

Q. Was there any other change that you noticed when you received the agreement? A. Yes.

Q. What was the first change you noticed? A. The paragraph labeled number 2, where it gave (203) USLIFE the option to pay the fee in cash or common stock and USLIFE had no obligation to even register the stock.

Q. Did the letter say whether the stock would be registered or not registered? A. It said they would be under no obligation so I assume it would be letter stock.

Q. You didn't like that? A. I didn't like it at all.

Q. You explained to us why you didn't like it.

So what did you do about it? A. As part of my conversation with Mr. Crosby, after talking to Mr. Rutherford about it, I talked to Mr. Crosby by phone about it.

Q. Tell me what you said to Mr. Crosby about that. A. In substance I reminded him that the agreement that we had in the year before was for cash and cash only and that this should be an extension of the same agreement and I felt it should be the same.

Q. What did Mr. Crosby say about that? A. Eventually he agreed.

Q. So he agreed to your request that the fee be paid only in cash, not in cash or stock at USLIFE's option? A. He eventually did agree.

Q. Did he agree at that time during that phone call? (204) A. I believe so. The best I can recall.

Q. Can you place this phone call in date? This letter is June 19. Do you remember about when the phone call

took place? A. I think we were having difficulty with that last time. I think we determined that we couldn't determine exactly but I thought it was on the 26th of June, but I am not certain.

Q. Did you say anything else to Mr. Crosby during that phone call? A. Yes.

Q. What did you say? A. That the termination date in the letter was simply too short. It was impossible for them to reach an agreement at that time because All American had agreed to purchase the minority interest in general and probably would not be able to have that done until the middle of 1973, so I asked for a year's extension.

Q. That is similar to the conversation you told us about in 1971, isn't it, when the first draft agreement that Mr. Crosby gave you had a six month period? That one expired you say December 31, 1971? A. Very similar.

Q. This one that you have in your hand now, Exhibit (205) K, expired December 31, 1972, is that right? A. That is correct.

Q. You said to Mr. Crosby as you told us you said to him in 1971 it was too short? A. Yes.

Q. What did Mr. Crosby say in 1972? A. Essentially the same thing he said before, that if at the end of the year or after the end of the year if they had a continued interest in acquiring they will review it at that time and extend the agreement.

Q. Didn't he in 1971 send Mr. Davey back to redraft it to give you a year? A. Yes, he did.

Q. He didn't do that in 1972, did he? A. No.

Q. Now you are sure he told you he would extend if still interested? A. Absolutely. It was impossible for this to happen.

Q. Did you write this down any place? A. No.

Q. Did you ever record that? A. No, I believed him.

Q. This is like the 1971 statement, you never recorded it. Are you sure about that now? (206) A. As far as I recall I didn't record it anywhere. I believed him.

Q. What happened, did Mr. Crosby send you a red[illegible] of the agreement? A. Yes, we got it, a changed agreement.

Mr. Miller: May I see Plaintiff's Exhibit 2 and 3?

(Handed to counsel.)

Q. Yesterday your counsel showed you some letters and I want to see whether I got the sequence right here. Exhibit 2 is a June 26 letter from Mr. Crosby and is a letter you received next, is it not? A. I believe so.

Q. Did that have enclosed with it Exhibit 3? A. I believe so.

Q. What is Exhibit 3, so the jury can remember? A. That is the revised fee agreement of June 26, 1972.

Q. That is the agreement that is signed by yourself, Mr. Crosby for USLIFE and Mr. Rutherford? A. Yes.

Q. Now, what happened with the provision in the draft agreement that said cash or stock, had Mr. Crosby changed it as he said he was going to do? A. Yes, he had.

(207) Q. What was the termination date in the agreement as finally signed? A. December 31, 1972.

(208) Q. So that had not changed, had it? A. No, it had not.

Q. Okay.

Now you raised, on your phone call, you are telling the jury, two questions with Mr. Crosby, did you not? A. Yes.

Mr. Miller: Let me read to the jury from Exhibit 2, if I may, your Honor. This is Mr. Crosby's letter to Mr. Hawes, June 26th, Mr. Crosby had sent a draft agreement. Mr. Hawes told you about the phone call.

(Mr. Miller read to the jury from Plaintiff's Exhibit 2 in evidence.)

Mr. Miller: I emphasize that word "question," singular.

(Mr. Miller continued reading from Plaintiff's Exhibit 2 in evidence to the jury.)

Q. Did you ever tell Mr. Crosby that you did not raise one question, but you raised two questions? A. No. In retrospect it is a cleverly worded one but at the time I didn't recognize it.

Q. In fact, didn't you write Mr. Crosby a letter when you received his letter with the new agreement? A. When I signed it and sent it back to him, yes.

Mr. Miller: Let me ask the clerk to mark this (209) next document as our next exhibit for identification.

(Defendant's Exhibit L was marked for identification.)

Q. Is Exhibit L the letter that you wrote to Mr. Crosby? A. Yes, it is.

Mr. Miller: I would like to have that marked in evidence.

Mr. Beatie: No objection.

The Court: Received in evidence.

(Defendant's Exhibit L was received in evidence.)

Mr. Miller: I would like to read this letter, which is short, to the jury.

(Mr. Miller read from Defendant's Exhibit L in evidence to the jury.)

Q. You didn't tell Mr. Crosby that he was wrong when he said only one question had been raised, did you? A. We were not combatants; no, I didn't.

Q. And the same as in 1971, you didn't write to him and say he had made any oral representations about extending the termination date, did you? A. No.

Q. Now, did you tell Mr. Rutherford about the (210) conversation with Mr. Crosby as to the extension? A. I don't recall at the moment. I do recall that Mr. Rutherford and I talked about it prior to me talking to Gordon and I told him I was going to talk to Gordon about it, that it was too short. After some period of time of discussing it with Mr. Rutherford, he agreed with me and then I called Mr. Crosby.

Q. Well, I am not sure that you heard my question. A. Maybe I didn't. Excuse me.

Q. Did you tell Mr. Rutherford about the conversation you had with Mr. Crosby during the telephone call in which you are now telling the jury Mr. Crosby said he would be willing to extend the 1972 termination date? A. I really don't recall.

* * *

(214) Q. * * * Now, in the fall of 1972, Mr. Hawes, did your employment change? A. Yes, I left the firm of Philo Smith & Company.

Q. Did you sign an agreement with Philo Smith & Company as to the divvying up of fees? A. Yes, I did.

Q. Did you make an arrangement with Philo Smith &

(215) Company to pay them a fee if you sold All American to a company other than USLIFE? A. I believe I did, yes.

Q. What was that arrangement? A. I would have to review the document. I haven't seen it in months.

Q. Let me show you a document which I will ask the clerk to mark for identification.

(Defendant's Exhibit M was marked for identification.)

Q. I am showing the witness Exhibit M for identification. A. Okay.

Q. Does that refresh your recollection as to what your agreement was with Philo Smith & Company as to fee in the event that you sold All American to a company other than USLIFE Corporation? A. Yes, it does.

Q. What was your agreement? A. That I would pay—that my firm would pay Philo Smith & Company 30 percent of the fee if that were accomplished.

Q. Were you contemplating selling All American to a company other than USLIFE (216) A. It would have been difficult to do at that point in time.

Q. Eventually were you contemplating doing that? A. It was one of the alternatives. I am a finder. That is my business.

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(220) Q. Now, according to this memo from November of '72 through March 26th of '73, you were talking to Mr. Gardiner about new companies, were you not? A. Yes.

Q. If Mr. Gardiner had become interested in one of those companies, would not that have the effect of further delaying the possible acquisition by USLIFE? (221) A.

I am not sure he could have bought it. He still had the balance of General United to pick up.

Q. But he was finishing that in April of '73, was he not? A. We are talking about '73?

Q. That's right, this is '73. A. Yes.

Q. And you weren't talking about things that couldn't happen, were you; you were talking about things you hoped would happen so you could earn a fee. A. Of course.

Q. So if Mr. Gardiner had picked up one of those and there was a deal made, that would have further delayed any possibility of USLIFE acquiring All American, would it not? A. Not necessarily. It would have depended on whether it was a cash deal, on what the situation was.

Q. It would have taken no time to bring about some deal. A. Okay, I will yield to that. It would have taken a period of time.

Q. Some time, does it not? A. Yes.

Q. You told us on direct it varies, right? A. Right.

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(222) Q. Did you have a meeting with Mr. Crosby in the fall of 1972? A. Yes.

Q. Remember the date? A. I think we have talked about October 24th, I think it is. We will have to look at the record.

Q. Did you make a memo of that meeting? A. Part of it, yes.

Q. This is the first memo you ever made of a meeting with Mr. Crosby, isn't it? A. Yes.

Q. Since you had started the new company, was it the course of your regular business to make memos? A. It was, yes.

(223) Q. Was it in the regular course of business that you made this memo? A. Yes. I'm not sure—

Mr. Miller: Let me mark it for identification.

(Defendant's Exhibit O was marked for identification.)

Mr. Miller: I offer it in evidence, your Honor, as a business record.

Mr. Beatie: No objection, your Honor.

The Court: Received.

(Defendant's Exhibit O was received in evidence.)

Mr. Miller: I want to be clear, your Honor, that it is received as a business record.

The Court: Yes.

Mr. Miller: I am going to read to the jury the one paragraph in here which relates to All American.

Q. There is only one paragraph that relates to All America, is there not, Mr. Hawes? A. I will have to read it.

Q. Why don't you look at it so we can be in agreement on that. A. Yes.

Q. That is the first paragraph, right? (224) A. Yes.

Mr. Miller: The date is 10/24/72. You can see the heading on the page is "USLIFE Corporation." There is a telephone number.

Q. Do you know whose phone number that is? A. I assume it was USLIFE's phone number.

Mr. Miller: There is a name, Gordon Crosby, Chairman, Chief Executive Officer.

Q. Why was that name on there? A. On our pages that we started, we left space at the top so that if we met additional people, we would add them on.

Q. So you met Mr. Crosby on the 24th of October, '72, and this is what you wrote, you wrote this right after? A. I dictated it.

Mr. Miller: I am reading now.

(Mr. Miller read from Defendant's Exhibit O in evidence to the jury.)

Q. Now, Mr. Hawes, there is nothing in here about any conversation to extend the termination date of the written agreement, is there? A. No, there isn't.

Q. And this is the only memo you ever made of a meeting with Mr. Crosby, is it not, that related to All (225) American? A. Evidently.

Q. You told me you made it in the course of your regular business, and that it was your regular business to make it, is that right? A. Yes. We have six 3-ring binders and three file drawers full of that sort of thing.

Q. Now, tell me what you didn't write but you told us yesterday you remember very clearly that Mr. Crosby said to you about the termination date. A. Well, two things:

One which also isn't in there, by the way, is our discussion of Old Line Life, that he had not yet concluded.

Q. I am asking you about the termination date. A. Oh, the termination date, okay.

Well, that is related to it, as a matter of fact. We discussed the Old Line Life thing. He said that wouldn't be done until near the end of the year. I made mention that General United is—this was indicated—would not be done until after the first of the year, simply inquired if

we should update the fee agreement, and he, in effect, laughed and said we'd take care of the paper work after the first of the year, if they got anything serious going.

Q. If they got anything serious going? (226) A. Yes.

Q. Mr. Hawes, what did you do when you heard that statement, anything? A. Went on and we talked about some other things.

Q. Did you set up any meetings or arrange anything for Mr. Crosby? A. No, there was nothing to do at that point.

Q. Okay. You didn't do anything after you heard that statement in reliance on that statement, did you? A. No.

Q. After you heard the statement at the meeting in June of '72 with Mr. Crosby, at the telephone call in June, '72 with Mr. Crosby that you told us about, in which Crosby, you say, said he would be willing to extend the December 31st date, did you do anything? A. No, the ball was Mr. Crosby's court.

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(230) Q. Go ahead, Mr. Hawes, tell us why you called Mr. Crosby. A. On March 28 the Wall Street Journal carried an article which announced USLIFE's intention to buy Standard Security Life of New York City.

I was quite startled to see that because I had had a fee agreement with USLIFE with regard to Standard Security. As a matter of fact, it is the one that we found the note this morning that said they would agree to extend it if necessary, et cetera.

Q. It had expired? A. Yes.

Q. Did Mr. Crosby tell you he entered another agreement (231) with another finder, Mr. Gould? A. He didn't give me the name but he said that.

Q. He said he couldn't pay you on Standard Security? A. That's right.

Q. Now, you went on to All American? A. Yes. I said in that event perhaps we better formalize our arrangement with All American.

Q. What did Mr. Crosby say? A. "I don't know, that is a lot of money."

I said, "What has that got to do with it?"

Q. You understood the agreement had expired, didn't you? A. I knew there was a date that was on it.

Q. You knew the agreement expired. Mr. Crosby said that was a lot of money. He didn't know whether he wanted to enter a new agreement? A. I said, "What has that got to do with it. You wouldn't be in this thing if it wasn't for my introduction and working with Jack Gardiner."

Q. That is what you said exactly? A. Almost.

Q. If you hadn't introduced him to Gardiner you wouldn't be in this one? A. Yes.

(232) Q. What else did you say? A. He said he had to think of his stockholders first and I at that time was you might say in a state of panic because I realized—

Q. No, Mr. Hawes, you were asked to tell us what you said, not to describe what you felt. A. What I said—

Q. What he said to you. A. I said, "Look, I am no longer with Philo, we may be able to get some flexibility in the fee agreement." I was hanging on for dear life.

Mr. Miller: I move to strike that.

The Court: Just what you said.

The Witness: It is a very difficult conversation, this was very emotional.

Q. You were on the witness stand. Do your best, Mr. Hawes. A. I will try.

Q. What else was said. A. I said, "I have spoken to Jack Gardiner recently"—and I had only two days before, the March 26 meeting—"And that I felt we would be able to get a good shot at getting the deal done in the middle of the year or later in the year."

(233) He said, "Well, I don't know, I will have to talk to Joe Fafian about it" and that was all.

Q. Is that the entire conversation? A. We ran through it pretty fast.

Q. Take your time, I don't want you to tell me I am rushing you. I will wait as long as you want, Mr. Hawes. A. Essentially I think that is it.

Q. Did you tell Mr. Crosby that he promised to extend the agreement? A. No.

Q. You never said that to him, did you? A. No.

Q. At any time did you ever say that to him? A. During that conversation?

Q. Yes. A. No.

Q. Mr. Crosby ever call you back? A. He certainly did not.

Q. Did you call him back? A. I did not.

* * *

*George E. Crosby, Jr.—for Plaintiffs—Direct*

(269) [Hearing of September 16, 1976]

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(271) GORDON E. CROSBY, JR., called as a witness on behalf of plaintiff, being first duly sworn, was examined and testified as follows:

*Direct examination by Mr. Beatie:*

• • •

(297) Q. * * * Leading up to it, there was a discussion in the period of 1972 when you talked about a second fee letter. There was a time when there was a second fee letter signed? A. Let's put this in sequence. The agreement which we signed in July expired.

(298) Q. When was that? A. I can't give you the precise date. You got it there.

Q. We got a document. I can tell you the document says it expired June 30. A. Expired June 30. We had a continuing interest in All American. At that point in time I was well aware of the fact Mr. Rutherford was working actively on our behalf. As a matter of fact Mr. Rutherford did most of the work, Mr. Hawes did little.

We were concerned on the advice of counsel that Mr. Rutherford had a side agreement with Philo Smith but Mr. Rutherford was not identified in our fee agreement.

So when the first fee agreement expired we had a continuing interest in All American. We drafted a new agreement, not an extension of the first one, an entirely new agreement that had different parties to the agreement, had different terms in it so far as payment because we preferred to have stock and/or cash and Mr. Hawes testified yesterday they only wanted cash. So we acquiesced to that and it had another termination date.

I take exception to the statement yesterday that it is not typical for agreements to have termination dates. I never heard of any contract or agreement that didn't have (299) a termination date.

You can't have an open ended to perpetuity, which means forever.

Q. You are not familiar with every agreement in the world. A. I am with the ones we work with.

Q. But you are talking about agreements you personally signed? A. You don't know all the agreements in the world either.

Q. No, sir. In any event, let me make sure I understand you. The first fee letter expired? A. Yes.

Q. Mr. Rutherford was doing some work and your counsel advised you that— A. Wait a minute. The new agreement had nothing to do with whether or not he was or was not doing work. We had an agreement with Philo Smith and Company.

At the time I signed that first agreement on behalf of USLIFE Corporation, I was not aware of the fact Mr. Rutherford had an agreement with Philo Smith and Company.

As a matter of fact, I pointed out that I had known Mr. Rutherford for a number of years, he successfully completed an acquisition for us, that I knew he was a close (300) friend with Mr. Ballard.

I felt badly that he wasn't a party to the agreement but Hawes came to me, it wasn't Rutherford, and I had no obligation to Mr. Rutherford for a fee because he didn't have a written agreement.

Subsequently, after the execution of that first agreement when I did become aware of Mr. Rutherford being a party to it and we were advised by Mr. Rutherford that he was having difficulty in getting a written agreement from Philo Smith on his behalf, I was concerned in

his interest as a friend, when it came time to execute a new agreement, I wanted to be very, very sure that Mr. Rutherford was a party to that written agreement.

Q. And so he was included as a party to this agreement? A. He was included as a party, yes, sir.

Q. Let me go back to make clear now. When you first signed the first agreement you didn't know Rutherford was involved? A. Not at the time that I signed that agreement I did not.

Q. You learned that later. Now, the first fee letter expired? A. Right.

(301) Q. You are preparing to enter into a new agreement? A. Correct.

Q. As far as you are concerned that is not an extension, that is a new agreement? A. It is a new agreement because an extension would simply be the original agreement with a different date on it of expiration.

Q. You didn't treat it as an extension, that was a new agreement to you? I want to know what you thought, Mr. Crosby. A. You are cutting it very fine here. It is a new agreement to be very precise because if it was an extension you would simply take the first agreement and put a different termination date on it. It is entirely different parties to it.

Q. It wasn't an extension as far as you were concerned, was a new agreement? A. You must have something in your mind and I am not going to get hung up on whether it is a new agreement or an extension on some technical point. To me it is a new agreement.

Q. That is all I wanted to know. A. If you and I agree to something and then it expires and you and I and this gentleman here agree, that is (302) a new agreement, it is a new understanding, new parties to it.

Q. Yes, sir, that is fine.

You stated that in July of 1972 or whenever this new agreement was signed you had a continuing interest in All American? A. Obviously, I wouldn't have signed the agreement.

Q. Did that interest continue along over the next month? A. The interest continued until we actually in fact completed the acquisition.

Q. That was in February of 1974? A. That is correct.

Q. When you signed this new agreement you intended if the transaction were consummated during the life of that agreement, the people who signed this agreement with you would be paid? A. It is not my intention, it is a contractual obligation.

Q. You were obligated to do that? A. It is a contract to do so.

Q. You were obligated by the contract to do that? A. Yes, sir.

* * *

(309) Q. What about General United? A. Was that consummated at the time we signed the second agreement?

Q. Oh, yes, I represent to you that it was. Do you have any recollection of that? A. Again, I have already told you that I cannot keep dates in mind, so if you say that it was consummated by that time, I am sure it was.

Mr. Miller: The representation is somewhat contrary to the testimony, your Honor.

The testimony yesterday was that 78 percent of the stock of General United was purchased in the spring of 1972; the remainder was purchased in April 1973.

The Witness: Right.

Q. Were you aware of that, Mr. Crosby? A. Aware of what?

Q. That 78 percent had been purchased at one point and a minority interest was still outstanding? A. Sure, it was in the Wall Street Journal.

Q. You knew that when you signed this agreement? A. Yes, sir.

Q. So you knew that Mr. Hawes had had a successful business relationship already in one instance with Mr. Gardiner? (310) A. That is one of the reasons I was disgusted with him, because he was reporting to me that he was going to Chicago working on our behalf, USLIFE Corporation's behalf, with All American, when in fact he was not telling me the truth, he was out there working to get a fee for himself, for acquiring another company, which was detrimental to our interest, and out of deference to my friendship with Mr. Rutherford, I was disgusted that Hawes was taking action which jeopardized us being able to make a deal, deprived Mr. Rutherford of a fee, and didn't even include Mr. Rutherford in the new transaction; and that is just not the way honorable people do business.

Q. In any event, you signed this agreement, and Mr. Hawes, through Philo Smith & Company, and Mr. Rutherford, were the other parties to it? A. My agreement was with Philo Smith & Company. It was not with Mr. Hawes.

Q. I understand that.

You knew Mr. Hawes was acting on behalf of Philo Smith & Company? A. Yes, I did.

Q. In practical effect, up to this time, had you ever dealt with anybody else from Philo Smith & Company in connection with your interest in All American? A. Not in connection with All American, no sir.

(311) Q. Did you reach a point during this period between the time you signed the second fee letter and the

time it expired when you were totally disenchanted with Mr. Hawes and wished to have nothing else to do with him? A. No. I am practical. I might be totally disenchanted with somebody, but continue if it is to the best interest of the people for whom I work to get something accomplished.

Q. In any event, did you decide during this period of time, this six months, from July 1st of 1972 through December 31st of 1972, that you didn't need Mr. Hawes anymore for this transaction? A. I didn't—there was no reason for me considering it, because, as we moved through that period of time, we got to a point I honestly didn't think we ever were going to acquire All American. It was a dead transaction as far as I was concerned, although I had a continuing interest. And as you know, I was on a Memorial Day vacation out in central Missouri and got a telephone call suggesting that how quick could I meet with All American, so I don't get any credit for acquiring All American; I'm not entitled to it.

They asked that we acquire them. And they did so after the fee agreement had expired and some considerable time after it had expired.

(312) Q. There wasn't any time during this period where you concluded that you had your own relationship with Jack Gardiner and you didn't need anybody else to help you? A. No. I didn't come to that determination because I didn't even consider it.

Q. And also during this six month period there wasn't any point in time when you felt that because of other transactions that were at issue with USLIFE that you couldn't be involved with All American anyway? A. Would you restate that, please?

Q. Well, you were involved in the Old Line Life transaction? A. Sure.

Q. And that prevented you from doing anything with All American, didn't it? A. Didn't prevent me from doing anything with All American.

Q. In practical effect, weren't you precluded from negotiating, having material negotiations with All American during the time that Old Line Life was pending? A. I could have continued negotiations and in fact did.

Q. Could you have consummated a transaction? A. Could have.

* * *

(315) Q. Let's go back to this question that I asked you earlier about deciding that you had your own relationship with Jack Gardiner and that you didn't need any outside assistance and you told me you didn't consider that during this period of June through December of 1972. A. I didn't, sir, for two reasons:

First, I had a contract and I knew what the termination date was, so it is nothing to consider, no decision to be made.

Secondly, although I was continuing my romance, if (316) you don't mind the suggestion, the phrase, the more I worked on it, the less I thought I was ever going to be able to make the deal. It was easy for me to keep contact because I had to go to Chicago all the time anyway.

* * *

(327) Q. You're quite right. After you had this visit from Mr. Smith and the discussion with him, you were still interested in All American, I take it? A. Let me try one more time. I had a continuing interest in All American from the time we first analyzed those companies that might be suitable acquisition candidates sometime in 1967 up until, in fact, we consummated the acquisition early in 1974.

The longer we went through these negotiations which are at discussion here I increasingly felt the possibility or the probability of us making an acquisition was getting lesser and lesser and lesser because of things which All American were doing, because I knew that despite the fact he appeared to be cooperative, Mr. Gardiner was (328) antagonistic to me making a meeting and, as a matter of fact, at the final board meeting of All American where the proposal was suggested, which led to the acquisition, he voted against the acquisition, and so, thinking that you might like to do something and doing it are two entirely different things.

So this date we are talking about, a meeting with Mr. Smith, let me put it in perspective, he requested to see me. I didn't. Mr. Hawes had just left his firm. I was disenchanted with Mr. Hawes and so told Mr. Smith. Mr. Smith had done no work on the All American deal, as this memorandum says, and it's a little bit embarrassing I didn't think Mr. Smith had any capability of being of assistance to us in the transaction. Smith knew that the agreement had an expiry (sic) date on it and I knew it, and I had no intention of entering into another agreement with Philo Smith after that expired, irrespective of interest or probability, so you are taking it a little bit out of context, counselor.

Q. When you entered into this extension—I'm sorry—when you entered into this second fee agreement, that was it as far as you were concerned? A. I didn't say that. It was it if it wasn't consummated by that expiry (sic) date. That is the reason the expiry (sic) date was in there. That agreement was not open ended. It had no option for extension or renewal or renegotiation. (329) It was a clear cut terminal date. I knew it. Mr. Rutherford knew it. Philo Smith knew it. Hawes knew it, and we all

willingly entered into the agreement, lived under the agreement for a long time. It expired. That's it. That's the end. No further obligation on their part to do anything for me or on my part to do anything for them.

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(342) Q. But Mr. Hawes I think—had Mr. Hawes told you anything about any relationship that he had ongoing with Mr. Smith on the All American transactions? A. I was not aware of that until the preparation for this trial.

Q. Were you unaware of the fact Mr. Hawes was continuing to act on behalf of Philo Smith? A. I didn't know what the arrangements were. I think that is what you asked me.

Q. Did Mr. Hawes ever tell you he would be continuing to act on behalf of Philo Smith in this transaction? A. I don't recall whether he did or not. I knew it didn't matter what he did because I knew the contract which I had was not with Hawes but with Smith.

Q. In any event at this point you really didn't have any need for Mr. Rutherford's services any more, did you? A. What point in time?

(343) Q. Still talking about the period of November of 1972. A. I always knew Mr. Rutherford would be helpful right up until the time we completed the contract.

He was a shareholder as was Mrs. Rutherford. They had an interest in this deal being consummated and had been a confidant of Mr. Ballard for many years, knew several of the directors and had for a number of years.

I had confidence in Mr. Rutherford. When Mr. Rutherford tells you something that is what he tells you as opposed to Hawes who is entirely different.

Q. Did you contemplate in November of 1972 using Mr. Rutherford right up to the time that you did the deal if you needed him? A. How did I know in November when

I was going to make the deal, because I didn't think at this time that I could make the deal.

Q. Assuming that you were going to make a deal you—
A. I can't hypothetically assume things that didn't happen.

Q. You knew at the end of 1972 that you could rely on Mr. Rutherford to help you in your efforts? A. I think I could rely on Mr. Rutherford today to help me in my efforts.

(344) Q. You knew it at the end of 1972? A. I have always known it.

Q. You knew that when you got into heavy negotiations with All American you could rely on him? A. It has nothing to do with having negotiations with All American. Mr. Rutherford is an honorable man. I think I could always rely upon Mr. Rutherford.

Q. Could you call upon him and he would help you in whatever you wanted? A. Mr. Rutherford assisted me in many situations and many things that had nothing to do with acquisitions.

Q. Now, I am talking about just All American. You knew in the end of 1972 that you could count on Mr. Rutherford to help you? A. Why limit it to 1972?

Q. You knew it throughout? A. I know it today.

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(375) Q. Mr. Crosby, after you received the message of the telephone call from Mr. Gardiner, did you speak to Mr. Rutherford? A. I believe I did, yes, sir.

Q. Can you recall what happened during that telephone call? A. No, I cannot specifically. In fact, I cannot even recall specifically—I have had so many calls with Mr. Rutherford over the time that if there was one at that precise time, I'd need something to refresh my memory.

Q. Well, do you recall that you asked Mr. Rutherford

to do anything for you? (376) A. I don't recall that I asked him. I don't know what there was to do. I had an appointment with Mr. Gardiner. Mr. Gardiner had contacted me. I didn't contact him.

Q. Do you recall if you asked Mr. Rutherford to set up an appointment for you that afternoon with Mr. Ballard? A. I don't recall that.

Q. Do you recall if after this, the receipt of the message from Mr. Gardiner, that Mr. Rutherford did anything to facilitate the acquisition of All American by USLIFE? A. I would say the answer to that would be affirmative. Mr. Rutherford was very active. He was meeting with investment bankers, he was meeting with shareholders. Mr. Ballard was on again-off again. He was trying to persuade Mr. Ballard, although Mr. Rutherford was not a finder, on an agreement with me at that time. He had his own stock interest on which he was going to get quite a premium, so he had a financial interest in it being consummated.

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(383) Q. Mr. Crosby.

I'd like to go back to this meeting which was scheduled by Mr.—at the request of Mr. Gardiner, through the message that you received.

You hadn't asked for that meeting yourself at any time? A. Been trying to arrange meetings with him thoughout (384) this entire period, but this specific one he called me, contacted me to see how soon I could come, he had a real problem which I think he will testify to if he appears.

And he was desperate to find a solution, and the life ring for him was that if he could be acquired by USLIFE Corporation or somebody, it would negate his problem; there was no way that he could cope with the problem otherwise.

So all of a sudden the unwilling suitor, the romancing went the other side.

Q. And this occurred over the Memorial Day weekend? A. No, sir, not over the Memorial Day weekend. I was in Missouri the Memorial Day weekend. When Gardiner was anxious to meet with me, I didn't know until I sat down with him why all of a sudden he had this dramatic change of heart. It wasn't until I sat with him face to fact that I was aware of the difficulty.

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(401) Q. You weren't thinking at this time about extending the agreement in the future, on the July 8 meeting? A. I have testified to this already.

Q. The answer is no, is that correct? A. I didn't say that, did I?

Q. I am trying to ask what your answer is, sir? A. My answer is that when we entered into all agreements which all parties accepted, we had a terminal date and that is the agreement and you don't enter into an agreement and then enter into some kind of side agreement. So we agreed on this expiration date.

Q. You don't enter into any side agreements, that is a standard practice of yours? A. Certainly is.

Q. At this time you weren't thinking about extending the agreement in the future? A. Nothing to think of. We were starting negotiations and we had an agreement for that year. I made many acquisitions in three or four months.

(402) Q. You weren't giving any consideration to an extension of the agreement? A. No.

Q. You didn't intend at this time to extend the agreement at sometime in the future? A. If I had I would have had an option for extension.

Q. The answer is no you didn't intend to extend the agreement in the future? A. I am not going to interpret the contract now. It says what it says.

Q. I am asking what you were thinking, Mr. Crosby, I am not asking you to interpret the terms of the contract. A. I told you my total recall both this morning and this afternoon of the meeting of July 8 with Mr. Hawes.

Q. At this time you didn't intend to extend the agreement when you signed it? A. I didn't intend or not intend.

The Court: I think he testified it wasn't a matter that they considered one way or the other.

Q. Is that correct, Mr. Crosby? A. I said the same thing with different words.

Q. You extended the agreement—excuse me, entered into a second fee agreement in 1972? A. Year later, on the expiration of the first one.

(403) What you say about the possibility of extending that agreement, about the possibility of extending the first agreement also true about the second without going through the questions?

Mr. Miller: I don't think that question can be answered. I wish it could be rephrased.

Q. Mr. Crosby, you entered into a second fee agreement, is that right, in June and July 1972? A. Let me help you, counsel. We are entering into all kinds of agreements all the time, investment agreements, consultant agreements, employment agreements, finder fee agreements, construction agreements, the vast majority of which have a terminal date.

All parties to the agreement agree to the terminal date because everybody assumes it is a reasonable date. If it wasn't, you wouldn't enter into the agreement in the first instance.

So I don't sit around cogitating if we don't do what the agreement says what are we going to do next. We will think about that when the time comes. We are talking about a year out.

Q. So you didn't intend to extend the second agreement when you signed it? A. Sir?

(404) Q. You did not intend to extend the second agreement when you signed it? A. As in the case of the first one I didn't even consider it.

* * *

(422) Q. You sent out the draft and your testimony is that they both came back to you and said, "No stock, must be cash." A. I didn't say that.

Q. Well, what did they say? First of all, you sent out the draft that provided for the option of stock. A. Maybe you had better let me tell you what we did. I don't think you understand what we did.

Q. That's fine. A. We sent to Mr. Rutherford and to Mr. Hawes a proposed agreement, which differed from the first agreement in several respects; one being that the second agreement suggested that we had the option of paying any fee they might be entitled to in cash or stock.

It is my recollection I did not hear from both of them. I think the one I heard from was Mr. Hawes who said he and Mr. Rutherford had discussed this, and that they would prefer not to have the cash/stock only and explained why.

So we discussed it—I remember specifically I discussed it with our board, agreed that we would modify the (423)

first draft, delete the option of paying in cash or stock, and agreed to pay in cash.

Q. And you acceded to his request? A. Let me finish, if I may. I'm telling you what I did.

Q. Excuse me, sir. A. So, on June 26th I sent to them second drafts of the second agreement, which differ from the first draft of the second agreement, only with respect to how the fee was going to be paid.

In due course they both accepted the agreement, signed it, and returned it to me and it was a fact accomplished. We had a new contract.

Q. Thank you.

Mr. Crosby, will you tell me why you entered into the second fee agreement? A. What do you mean by why we entered into it?

Q. Why did you enter into the second fee agreement? A. This has been asked and answered already.

> The Court: I thought we went into that this morning. But we will go again.

A. We entered into a contract with Philo Smith & Company and James Rutherford to assist us in an additional period of time to try to acquire All American.

(424) Q. You needed their services? A. Sir?

Q. You thought you needed their services? A. I thought Mr. Rutherford could be of assistance to us, yes.

* * *

*George E. Crosby, Jr.—for Plaintiffs—Direct*

(437) [HEARING OF SEPTEMBER 17, 1976]

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(483) Q. During the time you were engaged in the severe and heavy negotiations with All American in June, July—June through September of 1973, did you also speak to Mr. Rutherford then? A. Yes, the record shows that.

Q. At the time that you had those conversations with Mr. Rutherford, during the period from the end of May, say, through the time that the transaction was finally consummated, did you have any intention of renewing or extending the fee agreement? A. I did not, sir. That fee agreement expired the end of 1972. I had no intention of entering into a new agreement with anybody and I explained that to you in my testimony, I believe, yesterday morning.

• • •

(484) Q. Well, in October of 1972 did you have any intention of extending the fee agreement? A. No, sir.

Q. When you entered into the second fee letter in July, when it was finally— A. Wait a minute. Which year are we talking about?

Q. 1972, sir. A. In October of 1972?

Q. Yes. A. What was your question about October of '72?

Q. Did you have any intention of extending the fee agreement? A. No, sir.

Q. When you entered into the second fee letter in June and July of 1972, did you have any intention of extending it?

Mr. Miller: Your Honor, asked and answered yesterday, ad nauseum. I just object to it. We are

going way past the time we thought and I don't see the relevance of going into it again.

(485) Mr. Beatie: If we could just have that question answered.

The Court: It is repetitious and I will sustain the objection on that ground without passing on the relevance.

Q. Mr. Crosby, just tell me when you concluded that you would not extend this agreement anymore, that there would be no further fee agreements? A. I didn't reach any conclusion, counselor. I knew I had an agreement that expired as of December 31, 1972. Let's just take a minute and get this in clear perspective for the jury.

At that point in time I was totally disenchanted with Mr. Hawes. He had misrepresented the truth to me. He had worked not in the interest of USLIFE, was trying to sell All American to other companies. He made reports to me as to what he did when he wasn't telling the truth at all.

This will all be highlighted by Mr. Gardiner's testimony.

Mr. Hawes was no longer associated with Philo Smith & Company. And as you saw yesterday in some of my documents, I had no confidence in Mr. Smith or Philo Smith & Company to complete a transaction. So I was disenchanted with my finders, ex—Mr. Rutherford. Mr. Rutherford and I were in agreement that the probability of consummating an (486) acquisition with All American any time soon was not likely.

I removed it from my thinking, removed it from my work as an acquisition I was going to be able to make. True, I did have a continuing interest in it, as I testified several times, didn't think it could be made, turned my attention to other business activities, and out of the blue,

at a great surprise to me, pleasant surprise, I might add, subsequently Mr. Gardiner says, "Gordon, now is the time; let's see if we can put All American and USLIFE Corporation together."

And this occurred five months, counselor, after the expiration of the agreement. It is alleged here that I agreed to extend it.

As I testified yesterday, I have been around long enough to know that you don't verbally extend contractual agreements, and there was no commitment. Smith and Hawes came to see me and I told them they had no commitment. They threatened me, said, "If you don't pay us a fee, we'll sell it to somebody else," and my response was, and it is in the record, "Be my guest."

So I really, from the outset, have failed to understand what this trial is all about.

What is alleged simply is not the truth, is not documented.

Mr. Hawes stated he kept no records, he was not (487) in the business of "creating files." Crosby is in the business of creating files, as you and the jury have seen.

And what you have really got is one man's integrity, reputation, honesty, against another's. It is pure and simple.

Q. Mr. Crosby, when did you decide that you would not enter into any future fee agreements with— A. Sir, there was no decision to be made. There was no decision. The agreement expired December 31, 1972. No action was required on my part.

Q. I understand that. You never intended to extend that agreement or enter into a new one?

Mr. Miller: Your Honor, I object.

The Court: He has said the issue never arose. I think he said that and the jury will recall the

testimony, but I believe it was said at least a dozen times.

Mr. Beatie: Your Honor, I'd like to have Mr. Crosby—

The Court: All right, we'll have it for the thirteenth time.

Q. Mr. Crosby, did you ever reach any decision that you would not extend the agreement or enter into a new fee agreement? A. No decision was required. It expired.

(488) Q. Then you never considered this question at all? A. What question?

Q. The question of extending or renewing the fee agreement. A. If I had considered it, I would have attempted to do so, and as you well know, I did not.

Q. So you never did consider it? A. That's correct.

Q. And that is true from the beginning to the end? A. I didn't say that.

The Court: He did extend it once.

Mr. Beatie: I understand that, your Honor.

The Court: Well, then, why do you say from the beginning to the end? I just don't understand.

Q. Leave aside the point when you did extend it. Other than the period of time when you did extend it you didn't consider it at any other time, is that right? A. Counsel, you are confused. Don't confuse me.

Q. You extended it at one point, is that right, or renewed it, entered into a new agreement, whatever you like? A. Golly, you know, we have gone through the extension yesterday.

Q. Mr. Crosby, really, I'm finished if you will just answer this question:

(489) Q. You did enter into a second fee agreement, but other than that period of time when you entered into the second fee agreement, you never considered this question of extending it or renewing it any other time, right?

Mr. Miller: This has been asked and answered. Do we have to do it again?

The Court: He can answer it.

A. Look, we had an agreement for a year. Everybody exerted their best efforts to make an acquisition. We couldn't. At the expiration of the first agreement, which was in existence for twelve full months, I had an interest in All American. When the first one expired, I didn't think there was a chance to acquire it but—

Q. I'm sorry, Mr. Crosby— A. Just a minute.

Q. It is a simple question, sir.

Mr. Miller: No, your Honor, it is a simple question if it is asked and answered. He doesn't like the answer. That doesn't mean he has to cut the witness off.

Mr. Beatie: He hasn't answered it at all.

The Witness: I am getting ready to if you leave me alone. If you can be repetitious, sir, I can be repetitious.

Q. Okay. Whatever you want, sir, go ahead. (490) A. After we had invested a year of time in the transaction, although I didn't think there was a chance that it could be acquired, I did agree to enter into a second agreement, because I certainly wanted to clear up the relationship with Rutherford, Philo Smith and ourselves. That is a matter of record.

We all willingly—nobody twisted our arms—signed an agreement which had a termnal date, December 31, 1972.

At that point, having worked a year and a half on it without success, we decided, let's fry some other fish. We worked awfully hard on this, nobody's been successful, the people who said they had the key didn't have the key, so we went on to other activities, and five months later, not me, Mr. Gardiner, reopened negotiations, reluctantly, as he will testify, and we went on and in February of the next year, consummated the acquisition.

Q. And that is the extent of your thinking about the extensions of the agreement? A. That is the extent and that is the reason why I wanted to impose upon everybody's time to get it in the record.

Q. And you had no other views on the extension or renewal of the agreement? (491) A. I've said all I have to say on that subject, sir.

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JAMES E. RUTHERFORD, called as a witness, having first been duly sworn, testified as follows:

*Direct examination by Mr. Beatie*:

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(498) Q. Had you had business dealings with Mr. Crosby over those years? A. Yes. My first business deal with him, I served as the finder of a nice little insurance company, the Reliance Life.

Q. You also had dealings with him other than that? A. I met him at insurance meetings and talked with him about some of the possibilities.

Q. In 1971 in about the middle of the year did the possibility of an acquisition of All-American by U.S. Life Corporation come to your attention? A. It came to my attention in 1968.

Q. I understand that, Mr. Rutherford. We have stipulated to this fact and the jury can look at the stipulation.

But did it come to your attention again in 1971? A. Yes.

Q. Can you tell us about that? A. Well, I never lost sight of the fact that Ballard's company was what we could call a target company. In other words, a company that somebody sooner or later was going to undertake to buy.

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(500) Q. When you had these dealings with Mr. Ballard what did you do customarily? A. Well, as I said, I suggested at his request a number of companies to him. Nothing came of them.

We began talking with him about U.S. Life and continued to talk with him about U.S. Life until that deal was worked out.

Mr. Miller: Can we get a time frame on that?

Q. This started in 1971 and ran right through the completion of the transaction? (501) A. Actually started a little before that but it began to warm up some in 1971.

Q. That runs right through to 1974 when the transaction was completed? A. Yes.

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(509) Q. Mr. Rurtherford, did you meet with Mr. Ballard during the period from the fee letter until the transaction was consummated? A. Lots of times. We, as a matter of fact, had a policy there for quite a long while. About once a month I'd join him at the Union League Club as his guest for luncheon, and the next month or something like that I'd have him over to the Mid-Americ Club as my guest for lunch.

Q. What did you talk about at these meetings? A. Oh, we'd start out talking about the yearlings that he would buy in the spring and fatten up on his farm in Wisconsin and sell in the fall, and I was very much interested in that, but that conversation didn't last but a few minutes.

We got then onto the main subject.

Q. What was that? A. The subject was working out a deal between him and USLIFE.

Q. What was Mr. Ballard's attitude toward this deal in the early stages? A. The early stages he listened, but didn't show too much enthusiasm. He didn't need to say much to me because I knew him well enough to know what he was thinking, and as I said, he was a slow trader, slowest I ever dealt with. But his interest increased and in '71, I think it was, he asked (510) me a time or two, "What have you heard from our friend down east," meaning Gordon.

Q. And then at that time his interest was greater than it had been before? A. Oh, I think his interest increased gradually, and never did really decrease. He might say that he wasn't interested, but I knew him well enough to know when he was and when he wasn't. If he hadn't been interested he wouldn't have brought the subject up.

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(515) Q. Now, Mr. Rurtherford, you have already testified that you discussed this question of a new fee agreement with Mr. Hawes at around this time.

Do you recall the substance of that discussion? A. Well, when Hawes and I talked one subject always came up, it was the length of the agreement. I wasn't too much concerned about it. Hawes was.

Now, my lack of concern—

(516) Q. Don't get into that, Mr. Rutherford.

Can you recall anything else about your conversations with Mr. Hawes? A. We didn't talk about any other companies, I can tell you that, but—

Q. No, sir, I mean the conversations about the extension of the fee letter. A. No, I don't recall anything else of any import. Might have, but—

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(524) Q. Mr. Rutherford, we are now talking about the June 23rd telephone conversation. A. All right.

I called Crosby to report on the talks with Ballard and Hawes.

Q. Yes. And we understand that you told Mr. Crosby what Mr. Hawes told you. A. That's right.

Q. About the termination provision? A. That's right.

Q. What did Mr. Crosby say in response? A. He didn't agree. As I recall, we went ahead and signed it like it was.

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(532) Q. Mr. Rurtherford, I show you Plaintiff's Exhibit 3, which is in evidence.

Do you recognize that document? A. I do.

Q. What is it? A. It is the fee agreement.

Q. Does it have an expiration date? A. July 8, 1971.

Q. Look again, Mr. Rutherford; does it have a date recited in the text which specifies when it will expire? A. I made an error. In paragraph 3 it says, "Will expire December 31, 1972."

Q. You signed that document? A. I did, yes.

Q. And then the agreement in fact expired, didn't it? A. It what?

Q. Did the agreement expire? A. It did, yes.

(533) Q. At any time around the time that it expired, did you discuss its expiration or its renewal with Mr. Crosby? A. I did, after it expired.

Q. When was that? A. Either February or March. I had a heart attack on December 30th, was incapacitated in January, and large part of February and part of March.

Q. And you spoke to Mr. Crosby about the document? A. I did, updating the fee agreement.

Q. Tell me what happened during that conversation. A. Well, the conversation, the first one, I called him, and I said, "We ought to get going on this," and he said, "Can't do anything until we get the annual reports and have a chance to examine them."

Well, they come out—they are supposed to be filed the last day of February. Sometimes the folks get extensions, and then it takes a month or two for them to run them through their computers. These life insurance companies have to study them, and so on.

Q. And what did he say? Did he say anything about the agreement? A. No. I don't recall, at that particular time. He did a little bit later.

(534) Q. Well, what did he say later? A. Well, on May 30th, he telephoned me from St. Louis, and said, "Jim, I wish you would contact E. E. Ballard, see if I can see him at 4 o'clock this afternoon. I think I have worked out a proposition that they'll buy."

And my reply was, "Well, that's fine, Gordon, I'll be glad to call him, but if you think you've got a proposition they will buy, we ought to bring that fee agreement up to date."

His reply was, "No problem, no problem."

Repeated those two words twice.

Q. And did you do what he asked you to do? A. I did.

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*James E. Rutherford—for Plaintiffs—Cross*

*Cross Examination by Mr. Miller:*

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(535) Q. You told us that you had a finder's fee agreement with USLIFE on the Reliance Life transaction in '68? A. Yes, sir.

Q. Do you remember during the course of being out in Chicago with Mr. Crosby working on that transaction that you had occasion to introduce Mr. Crosby to Mr. Ballard? A. Yes.

Q. Can you tell me about that visit, Mr. Rutherford? A. Well, we had been over to Schaumberg, Illinois to talk with Howard Carlson and Norman Anderson, the two (536) officers of Reliance, and got back to O'Hare, where Gordon was to catch his plane and I was to get a limo back down.

We had an hour or so, and I said, "Gordon, I'd like to call E. E. Ballard,"—first I said, "Do you know E. E. Ballard?"

"Well, we have how'd it at conventions."

And I said, "I'd like for us to go down and say hello to him," because he at that particular time was nearing 67, in just a matter of four, five, six months, and he had no successor on board, and I told Gordon that. It whetted his appetite enough that he said, "Okay, let's go down."

We went down to see him, just a purely social visit. Came back. Gordon came on back to New York, and wrote Ballard a letter, copy to me. So that was the beginning.

Q. And do you remember that next year or so Mr. Crosby wrote and asked you whether you could set up something further with Mr. Ballard, another meeting? A. Now, let's see, '68—

Q. '69. A. I'd have to look at my books, but either I proposed it to him or he proposed it to me. Neither one of us stood on formalities when it came to—

Q. You're friends, aren't you? A. Oh yes, still.

(537) Q. Well, Mr. Crosby said that.

Were you able to set up that meeting in '69? A. I'd have to look. I don't know whether I have my '69 book here or not.

Q. That's all right, Mr. Rutherford. You remember you talked about it? A. If Gordon asked me to set it up, I did set it up.

Q. Okay. What did you have in mind might be the outcome of those meetings in '68, '69, were they just social or was there some business in the back of your mind? A. Oh, no, no, as a matter of fact, when I take somebody out, as I took Gordon, the conversation may be social, but the thinking is not.

Q. Go ahead and tell us—let me ask the obvious, what was the thinking in your mind? A. Well, I will repeat, Mr. Miller, that I knew Ballard's exact age from our previous visits, associations. I knew he had no man, at least he had no one, in my opinion, and as developed later, he didn't have any in his opinion, no man on board to succeed him.

Q. That was before Jack Gardiner was hired? A. Oh, yes, yes, quite a while before Jack was hired. So my story to Crosby was there may be an opportunity (538) there some day, and that whetted his appetite and he was perfectly willing to go down.

Q. Did you have a written agreement with Mr. Crosby, USLIFE, in '68, '69, on All American? A. I don't know when the first one was made.

Q. Well, you looked at it today, didn't you? Do you want me to show it to you again? A. I don't know whether that was the first one or not.

Q. I don't want to confuse you, Mr. Rutherford.

Mr. Miller: Let me see Plaintiff's Exhibit 1, if I may.

A. This one is 7—

Q. Let me show you Exhibit 1, Mr. Rutherford. I don't want to confuse you. A. All right. This was date in '71.

Q. Right. That's the first one, isn't it? A. I can't honestly tell you.

Q. Okay. A. But I am confident it is, because he mentions Hawes, and after that I—no disrespect to Hawes, but when I wanted to talk to Ballard or Crosby, either one, I phoned them myself.

Q. Okay. You had had other fee agreements with (539) USLIFE on other transactions, hadn't you, through the years; you had written agreements with Gordon Crosby, that if such and such a transaction came off you'd get a fee? A. Well, I had at least one that worked out. We made another one that didn't work out.

Q. Right, okay. A. Through no fault of Gordon's.

Q. You knew All American pretty well; you owned some shares in All American, didn't you? A. Yes, sir.

Q. Do you remember how many? A. Both my wife and I together, 8,785 shares at the time of the deal.

(540) Q. You had another thousand at one time that you sold? A. Sold it, needed a little money.

Q. So up until the consummation of the deal you owned about 9000 shares with your wife? A. 8785.

Q. Let me ask you whether you remember telling me during your deposition—I took your deposition, didn't I? A. Yes.

Q. That was the first pleasant occasion? A. You handled it very nicely, too.

Q. We met a second time and I hope I was almost as nice. A. Out in Chicago.

Q. You told me that time during the first deposition that from 1968, when you first made an introduction, you kept working on the possible acquisition "without any let-up," is that right? A. As I recall it, that is correct. I don't try to get a letter the first thing, Mr. Miller. No use cluttering up the files.

I wanted to see some evidence of interest. The minute I see that on both sides, then I endeavor to get the fee letter.

(541) Q. But you kept working on it without the fee letter, right on? A. Yes, sir, I did.

Q. You told me also when you talked about what would have happened if you hadn't gotten the fee letter, would you have kept on working until things got closer? A. I would have kept on doing two things: keeping Ballard warm, Crosby warm, and trying to get the fee letter—three things.

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(547) Q. Did that setting up of that meeting have anything to do with that written fee agreement that Rod had gotten from Gordon? A. Well, I don't know. But I would like to (548) say that if we didn't have the fee letter at that time, we were anxious to get it. If we did have it, when I get a fee letter I don't stop.

Q. You really get to work, don't you? A. Well, you work before you get one, Mr. Miller.

Q. Either way you were going to set up a meeting with Ballard and Crosby to see what you get moving? A. Get the parties together. You have to do it.

Q. You told me on deposition what you called the standard operating procedure on finder's fees, do you re-

member that? A. Well, I hope I can remember it. Give me a little tip on what I said about the procedure.

Q. I don't mean to be cute about it. Let me tell you the context of it.

I was asking about the termination dates in these letters and you said they have termination dates and the standard operating procedure, what you said about the termination date. Do you remember that? A. Well, I don't worry much about those termination dates. If the interest is there, you can extend them or renew them or write a new one. Gordon always writes a new one.

But in effect it is an extension, one of his (549) changed a little where he switched stock to cash.

Q. So it is not a matter that you really care about very much, whether there is a date in there or not? A. I would prefer that one not be in there but if I can make a sale to those people on both sides and get them interested in doing something, the expiration date is immaterial with most of them. I think Gordon puts underemphasis on it, much as I like him, I have to say that about him.

* * *

(550) Q. Did you have any conversations about extending (551) the date at all, other than the conversation you told us about on May 30, 1973? A. I don't worry too much about that, Mr. Miller, because in the Reliance Life case, Gordon extended that contract of his own volition because he said that we could not close it within the time specified.

I had so much faith in the fellow that the dates didn't matter with me, so long as they were interested.

* * *

(554) Q. Did you have a belief at the time whether the General United deal had any effect on Crosby's interest? A. Yes, I did.

Q. What was your belief? A. That it would have a dampening effect, and it did temporarily, but very temporarily.

Q. Okay. And did you— A. So I was wrong on that one.

Q. Remember, you told Hawes that it probably killed any negotiating with USLIFE. A. I don't remember the exact words, but that sounds about like what I would have said. I won't dispute it.

• • •

(560) Q. Yes, okay. Now, you tried to tell Mr. Beatie, when he was asking you questions, why you weren't concerned about the period of time of the fee letter, and he didn't really give you a chance. I want you to tell us why you weren't concerned about the period of time in that '72 fee letter. A. You are a scholar and a gentleman, sir, and I thank you. Here is the story:

You remember the first company that I sold Gordon, or I served as the finder in the case, was the Reliance Life of Schaumburg, Illinois. The two top men of that company were close friends, and we had worked together on a few little things. When that fee agreement was drawn, I didn't worry about the time. But Gordon decided, thank God, (561) that he could not close it, I don't remember the reason, within the time specified by the agreement, so he voluntarily extended the agreement.

And that led me, Mr. Miller, after my knowing him so long and having this instance, led me to say, well, if Crosby is on the other end of the line, he would do the right thing, so I don't give a hoot about some of these expirations.

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(562) Q. Now, we talked at the deposition—let me ask you again about the period from—second half of '72, start July through the end of the year—and I asked you about what you thought was going on with USLIFE and All American.

Did you have a view as to the possibility at the end of the year of things happening? A. Mr. Miller, I never lost that view.

Q. You thought things would happen? A. Sure.

Q. Let me read you a question and answer and see whether it helps a little bit, okay? A. All right.

Q. This is on pages 183 and 184 of your deposition:

The question was:

> "Q. Do you remember having any conversations with Mr. Crosby asking whether he would enter into a new written agreement extending the agreement that expired at the end of the year?
>
> "A. I do not. I do not have any recollection and I (563) don't think I did right then.
>
> "Q. And things at the end of '72 were quiet as far as this deal was concerned, weren't they?
>
> "A. Yes, sir, that's right."

A. That's correct. I did, as you will recall, Mr. Miller, check—right at the end of the '72 I was incapacitated,

anyway, but I checked along in February or March, when I got to feeling better, called Gordon, and he said, "Can't do a thing until we see the new annual reports," and a company I know, having been a company officer, they have to run these things through their computers, and it takes a little time.

Q. Mr. Crosby was interested in seeing those annual reports, wasn't he? A. Oh, yes. You have to have those.

Q. Did he tell you he was going to analyze them and work on them? A He didn't need to. I knew exactly what he did every time he got one.

Q. What did he do? A. He'd analyze it, look at it, file it.

Q. He had a staff for that, didn't he; he has a group of people, work for him? A. Yes.

(564) Q. You knew that the agreement ended, expired, at the end of '72, remember? A. That's right.

Q. And I asked you whether you thought you had to have a new agreement. Let me read the questions and answers and see whether you remember them. A. All right.

Q. These come from page 192:

> "Q. You would have to go to Mr. Crosby and say, 'Let's have a new fee agreement,' and he would have to say yes or no, wouldn't he?"

Your answer was:

> "Yes."

A. That's right.

> "Q. Yes or no. You would negotiate one, and if he said no, you would stop working, wouldn't you?"

And your answer was:

> "That's right.
> "Q. So everything was starting again. You had no agreement with Mr. Crosby?
> "A. But we were still talking.
> "Q. But you had no agreement, did you?
> "A. That is right."

That was the fact in '73, wasn't it? (565) A. That's it.
Q. Okay. A. I never did quit talking with him and he never did quit talking with me.
Q. To this day? A. Thank God.

• • •

(567) Q. Well, take a look at what your diary says about May 30th. A. It had better say the truth, because I know what May 30th was, burned into my head in good shape.
I'm ready, sir.
Q. What does it say, Mr. Rutherford? A. One, two, three, four, five—the sixth item on that page, see:

> "Crosby called from St. Louis, will call again at 11."

In other words, he called twice that morning. The first call he said, "Jim, I think I've worked out a proposition that the folks at All American will buy."
Q. Did he tell you what it was? A. No. And I didn't ask him. Because a finder, when (568) you get down that far, and they're trying to get going, why bother?
Q. Okay. A. "I've worked out a proposition I think that they'll buy and I wish you would call Ballard and see if I can see him at 4 o'clock this afternoon."

Now, Gordon wasn't born yesterday. He's a smart fellow. And he knew how close I was to Ballard, and he knew that I could get the appointment, and furthermore, he knew that unless he quieted Ballard, if Ballard was a little bit rambunctious, why, there'd be no deal. So he goes to see Ballard, and he said to me on the phone, "I'll see Jack later."

And then I was told by Ballard, I suppose, that Jack went down to New York on the 2nd of June.

Q. Do you know whether Crosby saw Ballard and Gardiner together on that day? A. I'm sure he did not, or I'm confident he did not. Here's what he said, Mr. Miller. I will repeat it:

> "I want to see Ballard alone. I will see Jack later."

So he saw Jack on June 2nd.

Q. You don't know whether Ballard had already had a meeting set up with Crosby, do you, before your phone call? (569) A. There was a notation in my book, something about a meeting, a notation in advance of that, something about a possible meeting on May 30th.

Q. So they already had had a possible meeting set up, hadn't they? A. It was definitized, the hour wasn't, and the place, and who was to attend and so forth, so Gordon called me, and I raised that with Ballard.

Q. Okay, now, what did you do to raise it with Ballard; you made one phone call? A. To arrange it with Ballard? Yes. I couldn't get him at the office. I got him at home. You want to look? The home number is the one where I make those calls, come over here and let me show it to you.

Q. Yes, sir. A. See, "Ballard, home, 698-3279."

Q. Did Crosby know Ballard's home number? A. Home number?

Q. Yes. A. Oh, I'm confident he did. He might have been—might have talked to him several times at his home.

Q. You made one phone call to Mr. Ballard and that was all you did and then Crosby called you back? A. That's right, he called me back within an hour, and (570) I said, "All set."

Q. Okay.

Now, you told us that Crosby said something about "No problem, no problem," on direct examination. A. That's right.

Q. Is that all he said? A. Well, I've already told you part of what he said. Now, when he called me and said, "I think I've worked out something that they'll buy, I wish you'd call Mr. Ballard and see if I can see him alone at 4 o'clock this afternoon," Gordon was then in St. Louis. "I'll see Jack later."

I said, "Fine, Gordon, I'll do it, but that being the case"—I didn't repeat what he said there, but—"that being the case, we ought to bring that fee letter up to date."

He said, "No problem, no problem." And I bought it 100 percent, hook, line and sinker.

Q. Let me ask you, Mr. Rutherford, did you know what the amount of the fee would be if you brought it up to date; was there any discussion about that? A. No.

Q. Or did you know whether Hawes was going to be a party to it? A. Oh, Hawes would have been.

(571) Q. Well, did you talk to Crosby about that? A. No.

Q. Or whether-- A. I don't cut out—Hawes was in there, and just because negotiations stopped for a while and we started again, I'd never stand for cutting a man out there.

Q. But you didn't talk to Crosby about whether he would be willing to update it with Hawes, did you? A. No.

Q. Or with Philo Smith, you didn't ask him about that? A. No, it didn't come up.

Q. You told me at the deposition that you had no recollection of ever discussing that conversation in which Crosby said, "No problem, no problem," with anybody before you got into this lawsuit. Is that right?

I mean, other than the lawyers maybe, but you never talked to Crosby about that later, did you? A. No.

• • •

## Court's Exhibit 1

## (Stipulations of Fact Excerpted from the Pretrial Order)

[SAME TITLE]

STIPULATIONS OF FACT

4. The parties stipulate that the following facts are undisputed and true for the purposes of this action only and that this stipulation may be offered to prove such facts. Each party reserves the right to (i) offer evidence relating to any of the following stipulated facts which does not contradict such fact, or (ii) present and discuss inferences which might be drawn from such facts. This stipulation shall not affect or limit in any way the contentions of the parties as to the weight, probative value, meaning, or sufficiency of any of these stipulated facts.

5. Plaintiff Philo Smith & Company, Inc. ("PS&Co.") is a corporation with a place of business at 460 Summer Street, Stamford, Connecticut.

6. At all times relevant to this action, Philo Smith ("Smith") has been President of PS&Co.

7. From approximately June of 1969 through August of 1972, Rodney A. Hawes, Jr. ("Hawes") was an employee of PS&Co. In September of 1972, Hawes left PS&Co. to form a firm named Insurance Investment Associates.

*Court's Exhibit 1*

8. Plaintiff James E. Rutherford ("Rutherford") maintains a residence at 219 East Lake Shore Drive, Chicago, Illinois and a business office at 1860 Insurance Exchange Building, 175 West Jackson Boulevard, Chicago, Illinois.

9. Defendant USLIFE Corporation ("USLIFE") is a corporation duly organized and existing under the laws of the State of New York with its principal place of business at 125 Maiden Lane, New York, New York.

10. At all times relevant to this action, Gordon E. Crosby, Jr. ("Crosby") has been Chairman of the Board of Directors, President and Chief Executive Officer of USLIFE.

11. All American Life & Financial Corporation ("All American") is a corporation duly organized and existing under the laws of the State of Delaware with a principal place of business at 8501 West Higgins Road, Chicago, Illinois.

12. At all relevant times prior to February 25, 1974, E. E. Ballard ("Ballard") was Chairman of the Board of Directors of All American.

13. At all relevant times prior to February 24, 1972, John W. Gardiner ("Gardiner") was President of All American Life & Casualty Company, a wholly owned subsidary of All American. On that date, Gardiner became President of All American and held that position at all remaining times relevant to this action.

14. On or about April 19, 1968, Rutherford introduced Crosby to Ballard. Thereafter, in November and December, 1969, Crosby expressed to Rutherford interest in dis-

cussing with Ballard the possible acquisition of all American by USLIFE.

15. On or about April 14, 1971, Hawes met with Ballard at the offices of All American in Chicago, Illinois. At this meeting, Hawes told Ballard that he could introduce All American to other companies which might be interested in acquiring All American or which All American might be interested in acquiring.

16. During May, 1971, personnel from Loeb, Rhoades & Co. approached Crosby concerning the possible acquisition of All American by USLIFE.

17. On or about June 8, 1971, Hawes telephoned Crosby and stated that Ballard asked him to contact Crosby concerning the possible acquisition by USLIFE of All American. Crosby told Hawes that he would open negotiations with Ballard to consider an acquisition of All American by USLIFE, if Hawes could obtain a letter from Ballard which indicated Ballard's willingness to meet with Crosby for such purpose. Crosby also said that subsequent to receiving such authorization, Hawes and Crosby could discuss a mutually acceptable fee.

18. In a conversation between Ballard and Hawes prior to June 10, 1971, Ballard had told Hawes that he wanted Rutherford to receive a part of any finder's fee paid on any acquisition of All American by USLIFE.

19. On June 10, 1971, Hawes met with Rutherford at Rutherford's office in Chicago and asked that Rutherford obtain the authorization from Ballard requested by Crosby. Rutherford agreed to participate in the transaction in exchange for an equal share of any finder's fee which might be paid by USLIFE.

*Court's Exhibit 1*

20. On July 2, 1971, Crosby sent Hawes a letter asking whether there had been any developments as to All American.

21. On July 8, 1971, Hawes met with Crosby at Crosby's office and informed him that Ballard was willing to meet to open initial discussions as to a possible acquisition by USLIFE of All American. At that meeting, Hawes delivered to Crosby a letter from Ballard to Rutherford, dated June 15, 1971.

22. At that July 8, 1971 meeting, Hawes, acting on behalf of PS&Co., and Crosby, acting on behalf of USLIFE, entered into and executed a written agreement, dated July 8, 1971, fixing the fee payable by USLIFE to PS&Co. as compensation for its services in connection with the proposed acquisition of All American in the event such acquisition took place. That agreement provided for USLIFE's obligation to pay PS&Co. a fee to expire if USLIFE and All American "do not enter into an agreement in principle looking toward an acquisition of [All American] by June 30, 1972."

23. On July 9, 1971, Hawes sent Rutherford a letter enclosing the July 8, 1971 agreement between PS&Co. and USLIFE and agreeing to share equally with Rutherford any fee due from USLIFE under the July 8, 1971 agreement.

24. On July 22, 1971, Crosby met with Rutherford in Chicago to discuss the possible acquisition of All American by USLIFE.

25. Hawes and Rutherford arranged a meeting between Crosby and Ballard which took place in Chicago on Sep-

tember 3, 1971. Gardiner also attended a part of the meeting.

26. On September 23, 1971, officers of USLIFE, including Crosby, and officers of First Boston Corporation, advisors to USLIFE, met with Ballard in Chicago to discuss a possible acquisition of All American by USLIFE. At that meeting USLIFE made an acquisition proposal by which it would exchange .4 shares of USLIFE common stock for each share of All American stock.

27. On September 28, 1971, Ballard sent Crosby a letter rejecting USLIFE's proposal.

28. On October 5, 1971, Crosby met with Gardiner in Chicago. At this meeting, Gardiner informed Crosby about a number of problems at All American and its subsidiaries which would have to be resolved before All American could again enter into negotiations for an acquisition of All American by USLIFE.

29. Although Crosby attempted on a number of occasions to arrange meetings with Gardiner during November and December, 1971, he was unsuccessful.

30. Crosby's efforts early in 1972 to arrange to meet with Gardiner were also unsuccessful.

31. On April 17, 1972, Crosby sent Gardiner a letter suggesting that they meet in Chicago on May 11, 1972. On April 24, 1972, Gardiner sent Crosby a letter agreeing to meet with Crosby in Chicago on May 11, 1972.

32. On May 11, 1972, Crosby met with Gardiner in Chicago.

*Court's Exhibit 1*

33. Prior to June 19, 1972, Hawes requested an extension of USLIFE's obligation to pay a fee in connection with the proposed acquisition of All American in the event such acquisition took place.

34. On June 19, 1972 Crosby sent Hawes and Rutherford a letter enclosing a draft of an agreement fixing the fee payable by USLIFE to PS&Co. and Rutherford for their services in connection with the proposed acquisition of All American in the event such acquisition took place. That draft agreement provided that USLIFE's "obligation hereunder shall expire if it and All American Life and Financial Corporation do not enter into an agreement in principle on or prior to December 31, 1972 looking towards the acquistion of said corporation."

35. On June 21, 1972, Hawes told Rutherford that the period of the draft agreement (requiring an agreement in principle by December 31, 1972) was too short and in Hawes' view the agreement should run for a year instead of six months. Despite his initial opposition to the length of the agreement, Hawes, acting on behalf of PS&Co., subsequently executed the new agreement with a December 31, 1972 termination.

36. On June 22, 1972, Ballard and Rutherford had a conversation in which Ballard informed Rutherford that he was not interested in an acquisition prior to the Spring of 1973, and then only if the stock of All American did not reach at least $18 per share. Despite his knowledge that Ballard believed no agreement in principal could be reached before the Spring of 1973, Rutherford subsequently executed the new agreement with a December 31, 1972 termination.

*Court's Exhibit 1*

37. On June 25, 1972, Rutherford sent Crosby a letter enclosing his typewritten notes of the meeting he had with Ballard on June 22, 1972.

38. By written agreement dated June 26, 1972, Rutherford, Hawes, acting on behalf of PS&Co., and Crosby acting on behalf of USLIFE, entered into an agreement which again obligated USLIFE to pay a fee to PS&Co. and Rutherford as compensation for their services in the event USLIFE acquired All American. That agreement provided, in language identical to the draft, that USLIFE's "obligation hereunder shall expire if it and All American Life and Financial Corporation do not enter into an agreement in principle on or prior to December 31, 1972 looking towards the acquisition of said corporation."

39. On October 27, 1972, Smith met with Crosby at Crosby's office in New York and discussed with him, among other things, the possible acquisition of All American by USLIFE.

40. On November 22, 1972, Crosby met with Gardiner in Chicago and discussed with him the possible acquisition of All American by USLIFE.

41. On November 22, 1972, Rutherford met with Ballard in Chicago and discussed with him, among other things, the possible acquisition of All American by USLIFE.

42. On or about May 30, 1973, Gardiner telephoned Crosby to suggest negotiations looking towards the acquisition of All American by USLIFE. Following Gardiner's telephone call, during June, 1973, Crosby, Gardiner

and other principals of USLIFE and All American met and discussed the terms of an acquistion.

43. On June 18, 1973, USLIFE and All American entered into an agreement in principle for the acquisition of All American by USLIFE. Under the terms of that agreement in principle, USLIFE proposed to acquire all of the outstanding common stock of All American, each share of All American common stock being exchanged for .6 of a share of USLIFE common stock. (USLIFE's stock had been split 2 for 1 subsequent to its first proposal in September, 1971.)

44. On that same date, the agreement in principle between USLIFE and All American was announced to the public.

45. On August 10, 1973, USLIFE announced that it would not proceed with the acquisition of All American on the basis of an exchange ratio of .6 of a share of USLIFE common stock for each share of All American common stock, but instead proposed a revised exchange ratio of .525 of a share of USLIFE common stock for each share of All American common stock.

46. On August 15, 1973, the Board of Directors of All American voted to reject USLIFE's revised proposel for an acquisition of All American and to terminate negotiations with USLIFE.

47. On October 15, 1973, USLIFE and All American entered into a second agreement in principle for the acquisition by USLIFE of all of the outstanding common stock of All American, each share of All American common stock being exchanged for .55 of a share of USLIFE common stock. The acquisition of All American by USLIFE was consummated on February 25, 1974.

**Plaintiffs' Exhibit 1**

**(Letter from Gordon E. Crosby, Jr. to Philo Smith & Co., Inc., dated July 8, 1971)**

[PHOTOSTAT]

(Opposite) ☛

LIFE CORPORATION

Gordon E. Crosby, Jr.
Chairman and
Chief Executive Officer

July 8, 1971

Philo Smith & Co., Inc.
460 Summer Street
Stanford, Connecticut

Attention: Mr. Rodney A. Hawes, Jr.

Reference: All American Life & Financial Corporation

Gentlemen:

To confirm my discussion with Mr. Hawes, who has brought to our attention All American Life & Financial Corporation, we understand that your "finder's fee" in the event we acquire said company would be 5% of the first million dollars of value given, 1% on the second through the fiftieth million of value given, and 1/2% on value given above $50 million. We are agreeable to such an arrangement provided that in no case would we pay more than 1% of total value given, and no payment shall be made unless the acquisition is consummated.

Our commitment under this letter shall expire if we and All American Life and Financial Corporation do not enter into an agreement in principle looking towards an acquisition of said company by June 30, 1972.

If the foregoing is agreeable to you, please so indicate by signing and returning the enclosed copy of this letter.

Very truly yours,

Accepted, July 8, 1971
PHILO SMITH & CO., INC.

By: _____
Rodney A. Hawes, Jr.



P-1

**Plaintiffs' Exhibit 2**

**(Letter from Gordon E. Crosby, Jr. to Rodney A. Hawes, Jr., dated June 26, 1972)**

[PHOTOSTAT]

(Opposite) ☛

125 Maiden Lane
New York NY 10038
212 422 5670

USLIFE CORPORATION

Gordon E. Crosby, Jr.
Chairman of the Board &
Chief Executive Officer

USA 33s - 475
(F.D. 4-23-71)

PLAINTIFF
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

2 -

FPI-81—9-24-75-500-4417

PC 37 mid. 05

June 26, 1972

Mr. Rodney A. Hawes, Jr.
Philo Smith & Co., Inc.
460 Sumner Street
Stamford, Connecticut 06901

Re: All American Life and Financial Corporation

Dear Rodney:

I have reviewed the question you raised about the fee agreement, and enclose two copies of an agreement providing for the extension to December 31, 1972 and payment in cash. Please sign and return both and I'll see that you receive a copy executed by all parties.

Please do not construe this "cash only" agreement as binding precedent on any future agreements.

Cordially and sincerely,

P-2

**Plaintiffs' Exhibit 3**

**(Fee Agreement dated June 26, 1972)**

[PHOTOSTAT]

(Opposite) ☛

# FEE AGREEMENT

Agreement, dated June 26, 1972, among USLIFE Corporation ("First Party"), Philo Smith & Co., Inc. ("Second Party") and James Rutherford ("Third Party").

WITNESSETH

In view of the covenants and representations herein contained, the Parties agree as follows:

1. If First Party shall acquire All American Life and Financial Corporation, it shall pay to Second Party and Third Party collectively a cash sum equal to (i) 5% of the first million dollars of value given, (ii) 1% on the second through the fiftieth million of value given plus (iii) 1/2% on value given above $50,000,000; but in no event shall First Party pay more than 1% of total value given. "Value given" shall mean the fair market value of the consideration actually paid by First Party on the day the acquisition is consummated.

2. The payment herein set forth is the sole payment in respect of the transaction that First Party shall make to Second and Third Parties collectively. Second and Third Parties shall make their own arrangement as to the division of such payment between them, as to which First Party shall not be a party; and Second Party and Third Party shall individually hold First Party harmless against claims made by the other which exceed First Party's obligation hereunder. Second and Third Parties shall give First Party a copy, executed by both, of such arrangement.

3. First Party's obligation hereunder shall expire if it and All American Life and Financial Corporation do not enter into an agreement in principle on or prior to December 31, 1972 looking towards the acquisition of said corporation

4. This Fee Agreement is in part an extension of First Party's agreement with Second Party dated July 8, 1971.

USLIFE Corporation

By _____
Chairman

Philo Smith & Co., Inc.

By _____
Vice President

_____
James Rutherford

P-3

**Plaintiffs' Exhibit 9**

**(Memorandum from Gordon E. Crosby, Jr., dated October 30, 1972)**

[PHOTOSTATS]

(Opposite) ☛

PC 46-a
A.S.

Memorandum

Date October 30, 1972

To FILE

From Gordon E. Crosby, Jr.

Subject Philo Smith

This past Friday afternoon, October 27th, I had a visit with Philo Smith, at which time we covered several different subjects, including All American, West Coast Life and our possible interest in the purchase of another mutual fund management company.

With respect to All American, I told Philo Smith that I had established a good relationship with Jack Gardiner and that I really felt an intermediary would be of no assistance. From a timing point of view, I pointed out that in that Old Line will not be closed until late December we would certainly not want to consider anything such as All American until 1972 final reports were all available. I'm sure that Smith's interest in All American was prompted by the fact that Rod Hawes has left his firm and Smith is concerned he might not be a participant in a finder's fee.

P-9-1

BEST COPY AVAILABLE

Philo Smith is an interesting fellow but I'm afraid not very competent. In that his firm does have some reputation, I would like to retain his good will.

E. Crosby, Jr.
ah

cc: Mr. J. Fafian

P-9-2
KWR

**Plaintiffs' Exhibit 19**

**(Memorandum from Gordon E. Crosby, Jr., dated July 12, 1971)**

[PHOTOSTAT]

(Opposite) ☛

USLIFE CORPORATION

PC 29 id. 95.

Memorandum

Date July 12, 1971

To FILE

From Gordon E. Crosby, Jr.

Subject All American Life & Casualty

On Thursday afternoon, July 8th, I met with Rodney Hawes of Philo Smith, Landstreet & Co. who reports that both he and Jim Rutherford had further discussions with E. E. Ballard who is now willing to meet with me in Chicago for the purpose of opening initial exploratory discussions concerning our acquisition of All American.

Mr. Hawes stated that it was E. E. Ballard's wish that Jim Rutherford be brought into the act and Philo Smith and Rutherford have therefore agreed to a split of the fee. You will find attached a copy of a letter prepared by Mr. Davey which Hawes and I each signed, agreeing to a finders fee. Hawes was to attempt to arrange a date with Ballard when I am scheduled to be in Chicago on July 22nd and 23rd. He called Mrs. Malley subsequently to report that Ballard was not available for either of those two days and we gave him some alternative dates.

We agreed that sometime the latter part of this week I would call Jim Rutherford personally to clarify the understanding with respect to the finders fee, also arranging to meet with Rutherford personally prior to any discussions I might be having with Ballard because I know he could be of helpful counsel to me.

G. E. Crosby, Jr.

mch

attachment

p-19

cc: Mr. J. Fafian
Mr. D. Manuel

**Plaintiffs' Exhibit 20**

**(Letter from James E. Rutherford to Gordon E. Crosby, Jr., dated June 25, 1972)**

[PHOTOSTATS]

(Opposite) ☛

JAMES E. RUTHERFORD
BUSINESS CONSULTANT
1860 INSURANCE EXCHANGE BUILDING
175 WEST JACKSON BOULEVARD
CHICAGO, ILLINOIS 60604

TELEPHONE 427-1022

JUN 28 1972
CHAIRMAN OF THE BOARD

Sunday Afternoon
June 25, 1972

Oops, I looked at the wrong week on the calendar! Anyway, the paper is done. JR

Mr. Gordon E. Crosby, Jr.
Chairman and Chief Executive Officer
USLIFE CORPORATION
125 Maiden Lane
New York, N. Y. 10038

Dear Gordon:

Late Friday afternoon, I awakened to the fact that most places in our building will be closed Monday, July 3, so I pulled out my trusty old portable and did the Ballard-Rutherford conversations myself. The copy is enclosed.

As I reported to you, Rod Hawes called me from Stanford Tuesday afternoon and made a date to see me at 9:15 Wednesday morning. Here's a summary of our conversation:

1. Hawes said agreement with you would expire soon and we should ask for an entension.
2. I showed him your proposed agreement which had arrived in the eight o'clock mail.
3. He said paragraph #1 was OK and I agreed.
4. He said paragraph 2 was a new one and he was not in agreement with you on that one. He wants cash and no unregistered stock. I indicated agreement with him but changed my mind after you explained the situation AND YOU MAY SO INFORM HIM. I will sign the agreement as written.
5. He said "we can handle paragraph 3". Yes we can BUT I expect to draw that agreement and word it so that another General United type deal cannot be proposed by either party until (a) you have been notified; (b) the other party to the fee-splitting agreement agrees and is assured in writing of a 50-50 split of the fee if such a deal is consummated; and (c) such an agreement will be binding upon Philo Smith & Co., Inc. as well as upon James E. Rutherford during the pendency of a fee agreement with you or any extension or extensions thereof.
6. He says paragraph 4 (agreement ending 12/31/72) is too short and should run a year. I now agree with you on the length. I should have realized that you could not grant one running beyond year-end.

Hawes said he would be home on Monday, the 26th, and would see you for a discussion of the fee agreement. I said I would withhold signing and returning the paper until I heard from both of you.

P-20-1

With regards, I am

Cordially,

HIGHLIGHTS of conversations between E. E. Ballard and James E. Rutherford during luncheon at the Mid-America Club, Chicago, Thursday, June 22, 1971:

After Ballard, at my request, had reviewed his experience in buying yearlings in the spring, grazing them on his farm in Wisconsin until October and then selling them, the talk took a sudden turn with a question from him.

EEB: Have you seen Gordon lately?

JER: No but I talked with him a few days ago about some other matters in which he and I have an interest. By the way, E. E. you should have taken Gordon's indicated probable offer of four-tenths of a share of USLIFE CORP. for each share of All Am. L & F. With his stock around 60 for some time, you would have received the $24 per share which you said you wanted.

EEB: Yes, as I look back, I should have given that more serious consideration.

JER: I think Gordon might still be interested on some basis. Why don't you two get together?

EEB: Not yet.

JER: WHEN? When can I suggest he contact you?

EEB: He named October but said it would be Spring of 1973 before they got some things straightened out. He did not name them then but did return to the subject later.

He commented on Gardiner: smartest fellow I have ever had with me -- very aggressive -- tied my hands by making some commitments which I did not like but thought it best not to overrule him. (JER didn't ask what they were -- Ballard seemed in the mood to talk so JER kept quiet).

Ballard then said that if conversations with Gordon were renewed, he would want to do the talking and would not bring Gardiner into them until he (Ballard) had a deal pretty well worked out.

JER: You are still the Chairman and CEO, aren't you? And Gardiner is the operating man but not the sole policy maker?

EEB: That's right. And I don't want Hawes in on it. There is nothing he can contribute (JER gathered that Ballard resented Hawes trying to have all his dealings with Gardiner -- that may be wrong but it is JER's hunch).

Ballard then wrote down two things he would do first -- he put them on the back of a copy of the report of their annual meeting -- it is attached.

1. Spin off the bank
2. Sell the Holiday Inns

He then stated a third one but would not write it down, so ...

P-20-2

JER wrote it and handed it to him to read:

3. Unless All American L & F stock is $18 to $25 a share by Spring of 1973, I will seek a good merger.

Ballard continued talking: said he would never agree to a deal calling for a million dollar fee and again said he did not want Hawes in on it. JER said "we can't ****eliminate Hawes". On that impasse, we left the table and talked again about cattle grazing as we went down to his Caddie in the Prudential Garage.

- - - - - - -

**** I doubt very much that Mr. Hawes would take the same stand IF Rutherford was the one named to be eliminated.

JER
6/25/72

P. S. This report is CONFIDENTIAL to you and you only. I haven't heard from Hawes but if he should call me, I don't intend to tell him anything beyond our talking about fattening yearlings on our grasslands.

You might like to ask him IF he saw Gardiner while he was in Chicago.

JER

P-20-3
xxx

**Plaintiffs' Exhibit 21**

**(Letter from Gordon E. Crosby, Jr. to James Rutherford, dated June 26, 1972)**

[PHOTOSTAT]

(Opposite) ☛

212 422 5670

USLIFE CORPORATION

Gordon E. Crosby, Jr.
Chairman of the Board &
Chief Executive Officer

PC 54 ex. GS.

USA 33a - 475
(ED. 4-23-71)

PLAINTIFF

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

21-D

FPI-MI—9-24-75-50M-4417

June 26, 1972

Mr. James Rutherford
1860 Insurance Exchange Building
175 West Jackson Boulevard
Chicago, Illinois 60604

Re: All American Life and Financial Corporation

Dear Jim:

I discussed with Rodney Hawes the "cash only" nature of the extension agreement and enclose two revised copies. Please sign and return both and I'll see that you receive a copy executed by all parties.

Please do not construe this "cash only" agreement as binding precedent on any future agreements.

Cordially and sincerely,

P-21

**Plaintiffs' Exhibit 26**

**(Memorandum from Gordon E. Crosby, Jr., dated November 27, 1972)**

[PHOTOSTAT]

(Opposite) ☛

UNIFE CORPORATION

D

Q

PC 47 ud. 65.

Memorandum

Date November 27, 1972

To FILE

From Gordon E. Crosby, Jr.

Subject All American

I received a telephone call from Jim Rutherford of Chicago early this morning, reporting that on November 22nd he had had a luncheon visit with E. E. Ballard who indicated he would be desirous of meeting with me some time during December or January, expressing an interest in trying to "make a deal".

Rutherford also reported that in recent weeks Mr. Ballard had been visited by both Philo Smith and Rod Hawes.

I told Mr. Rutherford that I had met with Jack Gardiner on November 22nd and really felt we were well advised to limit all of our discussions and negotiations with Mr. Gardiner. I told Mr. Rutherford that in view of the fact we did not expect to close Old Line until late December, that we had other tentative plans for early 1973 and that Gardiner had some matters that he wanted to resolve with respect to his bank, General United and other matters I thought that from a timing point of view we would not be in a position to become serious concerning All American until some time around mid-1973. I made it clear to Mr. Rutherford that there were some technical matters that had to be resolved which Jack Gardiner fully understood.

GEC, jr

G. E. Crosby, Jr.

cc: Mr. J. Fafian

R 26

**Defendant's Exhibit B**

**(Letter from James E. Rutherford to Rodney A. Hawes, Jr., dated June 16, 1971)**

[PHOTOSTAT]

(Opposite ☛)

Rec'd letter from Mr. Ballard re, read at 9:40 a.m. June 17 and mailed 4 p.m. immediately
6/16

JAMES E. RUTHERFORD
BUSINESS CONSULTANT
1860 INSURANCE EXCHANGE BUILDING
175 WEST JACKSON BOULEVARD
CHICAGO, ILLINOIS 60604

TELEPHONE 427-1022

June 16, 1971

Mr. Rodney A. Hawes, Jr., Vice President
Philo Smith & Co., Inc.
460 Summer Street
Stamford, Connecticut

Dear Rod:

This is being written on Tuesday, June 15, and ~~will be~~ will be taken with me when I leave for Little Rock and Hot Springs within a couple of hours.

Here's the reason for the above: Ballard did not get the desired letter dictated until this morning. Mrs. Gray, his secretary, tells me that she will mail it to me at the Majestic Hotel, Hot Springs National Park, Arkansas, by air mail this afternoon. I will arrive there about noon. However, as bad as our mail system is, it may not reach me before Thursday, the 17th.

Don't let the negative character of the letter mislead you. Ballard knows exactly why I want him to sit down with Gordon but he doesn't want to start any rumors in his office. Mrs. Gray read it to me from her shorthand notes and I think it will do the job.

Verbally, while we were at luncheon, Ballard said it might be best if Gordon telephoned him for a discussion of time and place. He specifically said he would like to meet with Gordon alone and <u>downtown</u> for the opening discussion.

It might be helpful to Gordon if he talked with me first. I can tell him some things about E. E. which I do not think it advisable to put in writing, not because they are bad for they are not, but they might give Gordon a better idea of how Ballard's mind works and some of the items that likely would come up in a meeting or as least likely would be on his mind.

If Gordon wants to call me during the three weeks I am away, he can get my location by calling Miss Haick (312) 427-1022 ( my office).

I must dash away so I'll close with regards and good luck.

Cordially,

JER

B

**Defendant's Exhibit C**

**(Letter from E. E. Ballard to James E. Rutherford, dated June 15, 1971)**

[PHOTOSTAT]

(Opposite) ☛

ALL AMERICAN LIFE & FINANCIAL CORPORATION
O'HARE PLAZA • 8501 WEST HIGGINS ROAD • CHICAGO, ILLINOIS 60631 • 312/693-3331

E. E. BALLARD
PRESIDENT & CHAIRMAN OF BOARD

June 15, 1971

Mr. James E. Rutherford
1860 Insurance Exchange Building
175 West Jackson Blvd.
Chicago, Illinois 60604

Dear Friend:

First, let me express my thanks for the luncheon on Friday of last week. The food was excellent and of course the view from the Mid-America Club is unexcelled.

You have spoken to me many times during the past several years, regarding your good friend Gordon Crosby and the excellent job he is doing in mergers and acquisitions. While I am doubtful that anything tangible could come from a meeting with him, I am always delighted to make new friends and to exchange ideas pertaining to this great business of personal insurance.

Subject to the above statement, I would be more than happy to have Mr. Crosby visit us here at All American . . or at such other place as would be mutually convenient.

Cordially,

E. E. Ballard
President

EEB:heg

c

**Defendant's Exhibit D**

**(Letter from Gordon E. Crosby, Jr. to Rodney Hawes, dated July 2, 1971)**

[PHOTOSTAT]

(Opposite) ☛

11/17

PC 27 mid as.

Personal and Confidential

July 2, 1971

Mr. Rodney Hawes
Phil Smith, Landstreet & Co.
460 Summer Street
Stamford, Connecticut 06902

Dear Rodney: Re: All American Life & Casualty

I confirmed our telephone conversation of June 8th with a memorandum to our acquisition file, a copy of which has today popped up from my pending file.

We are naturally curious as to whether or not there has been any developments.

You are, perhaps, aware of the fact that earlier this week we announced our intention to acquire Eastern Life Insurance Company of New York. We expect this transaction to be consummated some time during the month of September. If at all possible, we would like shortly thereafter to commence the acquisition of an additional life insurance company of size. All American Life & Casualty would fit such criteria.

Looking forward to hearing from you and with warmest personal regards, I am

Cordially and sincerely,

mrm

cc: Mr. J. Fafich
Mr. D. Manuel

7/9 - called re appt. wanted alt.
Aug. 17 + 18
Sept. 2 or 3 D

**Defendant's Exhibit E**

**(Letter from Rodney A. Hawes, Jr. to James E. Rutherford, dated July 9, 1971)**

[PHOTOSTAT]

(Opposite) ☛

PHILO SMITH & CO., INC.

460 SUMMER STREET
STAMFORD, CONNECTICUT 06901

July 9, 1971

Mr. James Rutherford
1860 Insurance Exchange Building
175 West Jackson Boulevard
Chicago, Illinois 60604

Dear Jim:

Enclosed is a copy of the fee agreement I negotiated with Gordon Crosby of USLIFE Corporation pertaining to All American Life & Financial Corporation.

As per our oral agreement of several weeks ago, Philo Smith & Co. will divide equally with you any fee received from USLIFE Corporation for the acquisition of All American Life & Financial if such agreement in principle is entered into prior to June 30, 1972.

Sincerely,

Rodney A. Hawes, Jr.
Vice-President

RAH/adt
Enc.

E

PHILO SMITH & CO., INC.

400 SUMMER STREET
STAMFORD, CONNECTICUT 06901

RECEIVED
JUL 12

July 9, 1971

Mr. Gordon E. Crosby, Jr.
Chairman and
Chief Executive Officer
USLIFE Corporation
125 Maiden Lane
New York, N. Y. 10038

Re: All American Life & Casualty

Dear Gordon:

Enclosed is the 1970 Convention Blank for All American Life & Casualty Company.

We are working with Jim Rutherford in Chicago in setting up a meeting date with Ballard. You should be hearing from one of us shortly.

Sincerely,

Rodney A. Hawes, Jr.
Vice-President

RAH/adt
Enc.

F

**Defendant's Exhibit K**

**(Letter from Gordon E. Crosby, Jr. to Rodney A. Hawes, Jr., dated June 19, 1972)**

[PHOTOSTATS]

(Opposite) ☛

212 422 5670

PC 35-1
as.

USLIFE CORPORATION

Gordon E. Crosby, Jr.
Chairman of the Board &
Chief Executive Officer

June 19, 1972

Mr. Rodney A. Hawes, Jr.
Philo Smith & Co., Inc.
460 Summer Street
Stamford, Connecticut 06901

Re: All American Life and Financial Corporation

Dear Rodney:

Our counsel advises that we should have a more precise agreement when we extend our commitment to December 31, 1972. I enclose two copies of an agreement. Please sign and return both and I'll see that you receive a copy executed by all parties.

Cordially and sincerely,

K-1

# FEE AGREEMENT

Agreement, dated June 19, 1972, among USLIFE Corporation ("First Party"), Philo Smith & Co., Inc. ("Second Party") and James Rutherford ("Third Party").

WITNESSETH

In view of the covenants and representations herein contained, the Parties agree as follows:

1. If First Party shall acquire All American Life and Financial Corporation, it shall pay to Second Party and Third Party collectively a sum equal to (i) 5% of the first million dollars of value given, (ii) 1% on the second through the fiftieth million of value given plus (iii) 1/2% on value given above $50,000,000; but in no event shall First Party pay more than 1% of total value given. "Value given" shall mean the fair market value of the consideration actually paid by First Party on the day the acquisition is consummated.

2. Such payment, at First Party's option can be made (i) in cash or USLIFE Common Stock (valued on the day of consummation of the acquisition) and (ii) by First Party or any of its subsidiaries (including a subsidiary which may become such by virtue of the acquisition). If First Party elects to make such payment in USLIFE Common Stock, it shall be under no obligation to register such Stock under the Securities Act of 1933.

3. The payment herein set forth is the sole payment in respect of the transaction that First Party shall make to Second and Third Parties collectively. Second and Third Parties shall make their own arrangement as to the division of such payment between them, as to which First Party shall not be a party; and Second Party and Third Party shall individually hold First Party harmless against claims made by the other which exceed First Party's obligation hereunder. Second and Third Parties shall give First Party a copy, executed by both, of such arrangement.

4. First Party's obligation hereunder shall expire if it and All American Life and Financial Corporation do not enter into an agreement in principle on or prior to December 31, 1972 looking towards the acquisition of said corporation.

USLIFE Corporation

By _____
Chairman

Philo Smith & Co., Inc.

By _____
Vice President

K-2

_____
James Rutherford

**Defendant's Exhibit L**

**(Letter from Rodney A. Hawes, Jr. to Gordon E. Crosby, Jr., dated June 28, 1972)**

[PHOTOSTAT]

(Opposite) ☛

PHILO SMITH & CO., INC.

450 Summer St
Stamford, Connecticut 06

June 28, 1972

Mr. Gordon E. Crosby, Jr.
Chairman of the Board &
Chief Executive Officer
USLIFE CORPORATION
125 Maiden Lane
New York, New York 10038

Reference: All American Life and Financial Corporation

Dear Gordon:

Thank you for your letter and the revised fee agreement.

As you requested, I am returning both copies of the agreement as signed by me: I'd like a copy of the agreement as fully executed.

Sincerely,

Rodney A. Hawes, Jr.
Vice President

RAH:hlc
Enclosures (2)

**Defendant's Exhibit O**

**(Memorandum to File from Rodney A. Hawes, Jr.)**

[PHOTOSTATS]

(Opposite) ☛

USLIFE CORPORATION
125 Maiden Lane
New York, N.Y. 10038

(212) 422-5670

Mr. Gordon Crosby, Chairman and Chief Executive Officer

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10/24/72

Rod visited with Gordon Crosby at his office in New York City. Crosby indicated that he had visited at some length with Jack Gardiner of All American Life while they were attending the CNA seminar meetings in Chicago recently. He felt that he was making much progress with Gardiner and that perhaps something could be worked out early next year. I got the impression that he had suggested to Gardiner that if the merger could take place that Gardiner would be promised the opportunity to run North American as well as Old Line in the very near future and that they would be merged into All American Life.

We discussed Hamilton International. He had just recently reopened his file, but again concluded that he would not be interested in pursuing it further. He had just been called last week by another broker, in fact a woman broker from San Francisco. He did not name the firm. This would indicate that the word is really out that Hamilton International is for sale.

Gordon and I also discussed USLIFE's interest in savings and loan companies. He mentioned that USLIFE's savings and loan activity was by law limited to California and that they would not need any help in that area.

O-1

USLIFE CORPORATION

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10/24/72
Continued

Gordon suggested that they were very interested in increasing their title insurance acquisition activity. I did not mention tc him the idea that Life Investors of Iowa might be very interested in selling their title companies. This is something we should follow-up on shortly. Also Computing and Software owns Idaho Title and thus far has been unable to increase their holdings in the title insurance area. Perhaps they would be interested in selling to Gordon, also.

4/12/74

National Underwriter: S. J. Fiuliano had 4,590; Marden Miller had 8,008

O-2

**Defendant's Exhibit S**

**(Memorandum by James E. Rutherford)**

[PHOTOSTATS]

(Opposite) ☛

HIGHLIGHTS of a meeting in Levering Cartwright's office on July 31, 1973. Present at the meeting were Cartwright, Philo Smith and James E. Rutherford. This outline was prepared by Rutherford immediately following the meeting.

* * * * * * * * *

Rutherford opened it by saying, "well, Philo, you asked Lev to arrange this meeting and I told him I would meet with you only because of him." Smith said, "yes, he told me that". Rutherford then said, " since you asked for the meeting, Philo, what do you have on your mind?" His reply was that he just wanted to visit with me regarding the All American - USLIFE deal.

Smith then said he believed we had a good case, legally, against USLIFE for payment of the fee previously agreed upon and added that he was awaiting opinion of his lawyers.

Rutherford then said, "As I told you and Hawes when you recently telephoned me, I will not sue USLIFE, nor will I join you in any legal action or in any pressure on Gordon Crosby. At the time the deal was agreed to, we had no fee contract and so far as I am concerned, I have dismissed the matter from my mind and have gone to work on other things. I pointed out that we were representing USLIFE under a signed contract and that Smith's sale of General United to All American, without notice to USLIFE or to me, was ethically, morally and possibly legally a violation of that contract. It certainly lessened USLIFE's interest in All American at that time. (Cartwright, at that time, made his only comment during the meeting by saying he talked with Gordon Crosby a few days ago by telephone and he was enthusiastic about General United).

Smith then returned to possible legal action on the fee. Rutherford again told him that he would not engage in legal action against USLIFE individually or in a joint action with Smith because (1) it appears that we could not succeed and (2) such action would turn on red lights all over the country and likely would cause many people to refuse to do business with us. Rutherford then said to Smith, "however, if you succeed in getting a fee, I will expect you to split it with me or will look to USLIFE to pay me the same amount. I always thought we were partners but it is apparent that you and Hawes didn't think so."

Smith then said to Rutherford; "You would the finder -- What would you do if USLIFE paid you and finder's fee?" That boxed Rutherford in because of his insistence that they were partners all the way and he replied, "I would split it with you" . Smith said n o more about finder's fee.

After more see-saw, Smith said he would not do anything until he received an opinion from his attorneys.

S-1

—over—

Smith then turned to the matter of moral responsibility for payment of the fee by USLIFE. Rutherford asked him point blank if he, Smith, felt that USLIFE had a moral responsibility to pay the fee and his reply was, "yes, I do". Rutherford made no comment.

After more see-saw, Smith said he didn't think he would sue USLIFE but that, after hearing from his attorneys, he planned to see GGordon Crosby to discuss the mmoral responsibility the pay the fee.

Still later, Smith sowdrsed himself and said he thought he could go ahead and see Crosby whhouthe moral responsibility with out waiting for the opinion of his attorneys.

One remark by Smith as to our future relationship caused Rutherford to say, "I,never, ever would have any other dealings with Hawes and, while I would not rule out dealings with you, Philo, my present mood is such that if you invited me to join you in a deal you would find me about as cold as a dead fish".

Toward the end of the hour and a half session of see-saw and repetition, Rutherford said to Smith, " Gordon Crosby and I have been friends for a long time (Smith interrupted to say "yes, sinde your Seattle days") . I have discussed a number of companies with him and am now watching some for possible action when the All American deall is closed. If I sell him one or more, I shall neither notify you nor cut you in on the fee. If you sell him anything, you need not notify me or cut me in on the fee".

At one time when I was criticizing Smith for the General United deal, he said, "I don't know what I can do about that". Right after Rutherford heard about that deal, he called Ballard and criticized himffor being left out. He also called Hawes and voiced the same criticism. Hawes claimed it would help rather than hinder the sale of All American to,USLIFE. He denied any responsibility to Rutherford ffor part of the fee or for notifying him that the deal was being made. He claimed in two different c onversations with Rutherford that Crosby had advance notice of it.

When Rutherford arose, shook hands with Cartwright and Smith, the latter made an effort to be friendly and tried to hold the door open while Rutherford hobbled out.

5-2
HHH

## Memorandum Opinion of Tenney, D. J.

[SAME TITLE]

APPEARANCES

For Plaintiffs: DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway
New York, New York 10005

Of Counsel: RUSSEL H. BEATIE, JR., ESQ.
BRENDAN P. BOYAIRD, ESQ.

For Defendant: ULLMAN, VAN GINKEL P.C.
277 Park Avenue
New York, New York 10017

Of Counsel: JOEL M. MILLER, ESQ.

SULLIVAN & CROMWELL
48 Wall Street
New York, New York 10005
Of Counsel: SUSAN J. MCCONE, ESQ.

TENNEY, J.

This is an action for the recovery of a finder's fee brought under this Court's diversity jurisdiction, 28 U.S.C. § 1332. In an earlier memorandum opinion, dated December 20, 1974, the Court sustained the complaint insofar as it supported recovery based on the doctrine of promissory estoppel but dismissed the plaintiffs' other claims, based on two written finder's fee agreements and

on the theory of quantum meruit, as barred by the statute of frauds, New York General Obligations Law § 5-701 (10), and by the parol evidence rule. Trial was had on the one remaining claim before a jury, and the defendant moved for a directed verdict at the close of the plaintiffs' case. For the reasons stated below, the defendant's motion is granted and judgment is entered in favor of the defendant.

## Facts

The involvement of the plaintiffs with the subject matter of this action began in 1968[1] when plaintiff James E. Rutherford ("Rutherford"), an individual with long experience in the insurance field, first began thinking about and working toward an eventual acquisition of All American Life & Financial Corporation ("All American"), a Chicago-based insurance company, by the defendant USLIFE Corporation ("USLIFE"), a larger insurance company which had begun an active acquisitions policy several years earlier. Rutherford was working at that time as a "finder," one who introduces target companies to acquiring companies. He was a personal friend of E. E. Ballard ("Ballard"), at that time chief executive officer of All American, and also knew Gordon Crosby ("Crosby"), chief executive officer of USLIFE.

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[1] In deciding the motion for a directed verdict, the Court must consider the evidence in the light most favorable to the plaintiff, "making due allowance for all reasonably possible inferences" favoring the plaintiff. *Galloway* v. *United States*, 319 U.S. 372, 395 (1943). The credibility of the witnesses is not to be weighed. *Simblest* v. *Maynard*, 427 F.2d 1, 4 (2d Cir. 1970). Thus, when the plaintiffs have put in some evidence in support of their position, the Court has assumed, for the purpose of deciding this motion, the correctness of the plaintiffs' position.

*Memorandum Opinion of Tenney, D. J.*

In the Spring of 1971, plaintiff Philo Smith & Co. ("PSCO"), through the head of its finding department, Rodney Hawes ("Hawes"), approached All American with an offer of assistance in finding a company which might acquire All American or which All American might acquire. On June 8, 1971 Hawes called Crosby, stated that he knew Ballard and said that he could arrange a meeting between Ballard and Crosby. Crosby asked Hawes to get a letter from Ballard stating that a meeting could be arranged. When Hawes asked about a fee, Crosby said that that could be arranged if Hawes got the letter. Hawes had learned of Rutherford's history of involvement with Ballard and Crosby and met with him to ask him to request the letter from Ballard. Hawes, on the part of PSCO, and Rutherford agreed that they would be partners in any fee paid on the All American acquisition.

On July 8, 1971, Hawes met with Crosby at the USLIFE offices in New York. Hawes gave Crosby the requested letter from Ballard. Crosby asked Hawes to set up the meeting with Ballard, and Hawes agreed to do so. They then discussed possible fee arrangements. Hawes proposed the "Lehman" formula which Crosby rejected as resulting in too large a fee. Hawes then proposed a second formula which Crosby agreed to. Crosby called in his staff counsel, who prepared a draft of a fee agreement which stated that the agreement would terminate unless an agreement in principle looking toward an acquisition was made before December 31, 1971. Hawes objected, telling Crosby that it would be impossible to complete an agreement in principle by that time. Crosby then agreed to extend the termination date an additional six months to June 30, 1972. Hawes stated that he was

still concerned about the termination date, and Crosby responded, "If we're still interested in the acquisition at the time of the termination date, we'll be very happy to extend it." Crosby and Hawes then signed the agreement on behalf of USLIFE and PSCO respectively.[2]

The next day Hawes sent Rutherford a letter enclosing the fee agreement and agreeing to share equally with Rutherford any fee which PSCO would receive from US LIFE under the agreement. Thereafter, Hawes and Rutherford arranged a meeting between Crosby and Ballard which took place in Chicago on September 3, 1971. Jack Gardiner ("Gardiner"), who became President of All American in February of 1972, also attended a part of that meeting. At a meeting in Chicago on September 23, 1971, Crosby, accompanied by another officer of US LIFE and an officer of First Boston Corporation, ad-

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[2] The text of the first agreement read as follows:

> "To confirm my discussion with Mr. Hawes, who has brought to our attention All American Life & Financial Corporation, we understand that your 'finder's fee' in the event we acquire said company would be 5% of the first million dollars of value given, 1% on the second through the fiftieth million of value given, and ½% on value given above $50 million. We are agreeable to such an arrangement provided that in no case would we pay more than 1% of total value given, and no payment shall be made unless the acquisition is consummated.
>
> Our commitment under this letter shall expire if we and All American Life and Financial Corporation do not enter into an agreement in principle looking towards an acquisition of said company by June 30, 1972.
>
> If the foregoing is agreeable to you, please so indicate by signing and returning the enclosed copy of this letter."

visors to USLIFE, made an acquisition offer to Ballard, which Ballard rejected categorically. Following his return to New York, Crosby told Hawes that the offer had been rejected. Hawes suggested that Crosby should have met with Gardiner instead of Ballard, and that perhaps Hawes should now meet with Gardiner. Crosby agreed, and Hawes flew to Chicago and met with Gardiner on October 1, 1971. During that meeting Gardiner agreed to meet with Crosby and did actually meet with him in Chicago on October 5. Later in the same month Hawes assisted Crosby in setting up another meeting with Gardiner. Following that meeting, Hawes took no part in arranging meetings between USLIFE and All American and performed no further acts in aid of the transaction. At that time, the written fee agreement had approximately eight months to run. Hawes continued to meet with Gardiner, however, discussing other companies which might acquire All American and which All American might itself acquire. One such acquisition by All American was announced in December of 1971 and finally consummated in April of 1973. PSCO received a fee of approximately $275,000 for acting as finder on that transaction.

In June of 1972 the first fee agreement was about to expire. Crosby and Hawes met at the beginning of that month. Crosby told Hawes that he still had an interest in acquiring All American. Subsequently, Crosby sent Hawes a copy of a new fee agreement which included Rutherford as a partner with PSCO, extended the expiration date to December 31, 1972, and gave USLIFE the option of paying the fee in stock or in cash. After discussing the new agreement with Rutherford, Hawes called Crosby and objected to the new payment option and to the shortness of the extension of the termination date. Crosby agreed to reconsider the payment situa-

tion but stated, as he had the year before, that the termination date would be reexamined at the end of the agreement and extended if USLIFE still had an interest in acquiring All American. Crosby sent a revised agreement to Hawes which stated that PSCO and Rutherford would be paid in cash but which retained the December 31, 1972, termination date. Hawes and Rutherford signed this agreement.[3] Hawes subsequently told

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[3] The second fee agreement read as follows (signatures deleted):

"Agreement dated June 26, 1972, among USLIFE Corporation ('First Party'), Philo Smith & Co., Inc. ('Second Party') and James Rutherford ('Third Party').

WITNESSETH

In view of the covenants and representations herein contained, the Parties agree as follows:

1. If First Party shall acquire All American Life and Financial Corporation, it shall pay to Second Party and Third Party collectively a cash sum equal to (i) 5% of the first million dollars of value given, (ii) 1% on the second through the fiftieth million of value given plus (iii) ½% on value given above $50,000,000; but in no event shall First Party pay more than 1% of total value given. 'Value given' shall mean the fair market value of the consideration actually paid by First Party on the day the acquisition is consummated.

2. The payment herein set forth is the sole payment in respect of the transaction that First Party shall make to Second and Third Parties collectively. Second and Third Parties shall make their own arrangement as to the division of such payment between them, as to which First Party shall not be a party; and Second Party and Third Party shall individually hold First Party harmless against claims made by the other which exceed First Party's obligation hereunder. Second and Third Parties shall give First Party a copy, executed by both, of such arrangement.

*(Footnote continued on following page)*

Rutherford about Crosby's oral promise to review the termination date at the end of the agreement.

Hawes left his job with PSCO in September of 1972 but had an agreement with PSCO to continue to be involved with the All American/USLIFE transaction. Hawes met with Crosby on October 24, 1972. After discussing the possibilities of an All American/USLIFE transaction being consummated before the end of 1972, Hawes suggested that the fee agreement be extended. Crosby replied, "We'll take care of the paper work if we get anything going after the first of the year." Three days later Crosby met with Philo Smith of PSCO and stated that he was disenchanted with the performance of Hawes and that he had no intention of entering into another agreement with PSCO after the current one expired on December 31, 1972.

During the period of the two fee agreements, and, indeed, continuously throughout the period from 1968 until 1974, Rutherford was working to bring about an acquisition of All American by USLIFE, particularly in his regular meetings with Ballard. Over the Memorial Day weekend, 1973, some five months after the fee agreement had expired and at a time when Crosby, despite an interest in acquiring All American, though the acquisition could not be accomplished, Gardiner's office called Crosby

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*(Footnote continued from preceding page)*

3. First Party's obligation hereunder shall expire if it and All American Life and Financial Corporation do not enter into an agreement in principle on or prior to December 31, 1972 looking towards the acquisition of said corporation.

4. This Fee Agreement is in part an extension of First Party's agreement with Second Party dated July 8, 1971."

at his vacation home and asked for a meeting. Crosby then called Rutherford and told him that he thought he had a proposal that All American would buy and that he wanted Rutherford to set up a meeting with Ballard. Rutherford agreed to do so, but told Crosby that the fee letter should be brought up to date. Crosby responded, "No problem, no problem."

On June 18, 1973, USLIFE and All American entered into an agreement in principle for the acquisition. That agreement was withdrawn by USLIFE on August 10, 1973, and another proposal was made which was rejected by the All American board of directors on August 15. A second agreement in principle was entered into on October 15, 1973, and the acquisition was consummated under the terms of that agreement on February 25, 1974. Throughout this period Rutherford was actively working for the acquisition, talking with shareholders, directors and investment bankers.

## Statute of Frauds and Parol Evidence Rule

As this Court made clear in its earlier opinion, the plaintiffs' claim for recovery of a finder's fee in this case must confront and overcome the serious obstacles posed by two basic legal doctrines: the statute of frauds and the parol evidence rule.[4] Section 5-701(10) of the New York General Obligations Law was amended in 1964 to

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[4] In this diversity action, the Court must apply state substantive law. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). The applicability of New York state law to this case has not been questioned.

make it absolutely clear that all contracts to pay compensation for the services rendered by a finder were void unless in a signed writing. *See Minichiello* v. *Royal Business Funds Corp.*, 18 N.Y.2d 521, 277 N.Y.S.2d 268, 223 N.E.2d 793 (1966). The New York Court of Appeals has stated that the statute serves the policy of protecting "the principals in the sale of a business from . . . a claim for a . . . finder's fee not supported by the written evidence." *Intercontinental Planning, Ltd.* v. *Daystrom, Inc.*, 24 N.Y.2d 372, 383, 300 N.Y.S.2d 817, 826, 248 N.E.2d 576, 582 (1969). To allow the statute to be avoided easily would be to open the door "wide to possible frauds—the very thing which the statute was designed to prevent." *Bright Radio Laboratories* v. *Coastal Commercial Corp.*, 4 App. Div. 2d 491, 494, 166 N.Y.S. 2d 906, 909 (1st Dep't 1957), *aff'd*, 4 N.Y.2d 1021, 177 N.Y.S.2d 526, 152 N.E.2d 543 (1958). The impact of the statute of frauds on this case is strengthened by the effect of the parol evidence rule. The parties to this action executed two integrated written agreements, whose terms are not to be varied by oral agreements. *See, e.g., Intercontinental Planning, Ltd.* v. *Daystrom, Inc., supra*, 24 N.Y.2d at 378-79, 300 N.Y.S.2d at 822-23, 248 N.E.2d at 580; *Tramco Industries, Inc.* v. *Broad Hollow Assoc.*, 23 N.Y.2d 841, 297 N.Y.S.2d 739, 245 N.E.2d 408 (1969).

PROMISSORY ESTOPPEL

In its earlier opinion, this Court indicated that the plaintiffs had to establish the presence of the elements of promissory or equitable estoppel if they were to avoid the combined effect of the statute of frauds and the parol evidence rule. The most basic of these elements is that an oral promise must be made contemporaneously with

or subsequent to the making of a written agreement. *See M.H. Metal Products Corp.* v. *April*, 251 N.Y. 146, 149, 167 N.E. 201, 202 (1929). For the purposes of ruling on this motion, the Court must assume that the defendant made four promises at the time of or subsequent to the execution of the first of the two written fee agreements, as described above. Thus, in order to establish their right to recover the finder's fee, the plaintiffs were required to show that all of the remaining elements of promissory estoppel were present with respect to at least one of these promises. First, they had to offer evidence that the promise was fraudulently made. *Bulkley* v. *Shaw*, 289 N.Y. 133, 139, 44 N.E.2d 399, 401 (1942); *Sawyer* v. *Sickinger*, 47 App. Div. 2d 291, 296, 366 N.Y.S.2d 435, 440 (1st Dep't 1975); *Wagner* v. *Manufacturers' Trust Co.*, 237 App. Div. 175, 178, 261 N.Y.S. 136, 140 (1st Dep't 1932), *aff'd* 261 N.Y. 699, 185 N.E. 799 (1932). Second, the defendant must have anticipated that the plaintiffs would rely on the oral promise and such reliance must have been reasonable on the plaintiffs' part. *See Triple Cities Construction Co.* v. *Maryland Casualty Co.*, 4 N.Y.2d 443, 448, 151 N.E.2d 856, 858, 176 N.Y.S.2d 292, 295-96 (1958). Third, the plaintiffs must have relied on that oral promise by engaging in acts which are "unequivocally referable" to the oral promise. *Burns* v. *McCormick*, 233 N.Y. 230, 232, 135 N.E. 273 (1922); *Bright Radio Laboratories* v. *Coastal Commercial Corp.*, *supra*, 4 App. Div. 2d at 494, 166 N.Y.S.2d at 909-10. Fourth, the plaintiffs must have suffered substantial injury as a result of engaging in those acts of reliance. *M.H. Metal Products Corp.* v. *April*, *supra*, 251 N.Y. at 150, 167 N.E. at 202; *see Triple Cities Construction Co.* v. *Maryland Casualty Co.*, 4 N.Y.2d at 448, 151 N.E.2d at 858, 176 N.Y.S.2d at 295-96.

Looking at the evidence in the light most favorable to the plaintiffs, as it is again constrained to do, the Court concludes that the plaintiffs have not produced evidence showing that all of these elements were satisfied with respect to any single promise. Indeed, the plaintiffs have completely failed to demonstrate any injury resulting from acts of reliance or that any acts of reliance were "unequivocally referable" to any oral promises.

*Fraud*

The oral promises must be analyzed separately with respect to the element of fraud. Crosby's first oral promise, made contemporaneously with the making of the first written fee agreement, was "[i]f [USLIFE] is still interested [in acquiring All American] at that time [June 30, 1972], we'll be very happy to extend it." The substance of the second oral promise, made contemporaneously with the second fee agreement, was the same. Under the law of New York, one who seeks to show that a statement was fraudulently made must demonstrate, at a minimum, that the maker of the statement represented facts of which he had no actual knowledge or stated a present intention when he in fact had formulated no intention one way or the other. *See Channel Master Corp.* v. *Aluminum Limited Sales, Inc.*, 4 N.Y.2d 403, 407-08, 151 N.E.2d 833, 835-36, 176 N.Y.S.2d 259, 262 (1958); *Ultramares* v. *Touche*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931). In the present case, the plaintiffs have failed to produce any evidence of Crosby's intention concerning the substance of his oral promises of July 1971 and June 1972 at the time he made those promises. At both times he stated only that he would renew the agreements *if* USLIFE was still interested in the acquisition. In no

way did Crosby promise to renew the agreements. At best, he promised only to reexamine the status of the defendant's acquisition plans at the expiration of each agreement and to extend the agreements if USLIFE were still interested. At trial, plaintiffs asked Crosby if he intended *to renew* the fee agreements when he made the oral promises; Crosby stated that he had formed no such intention one way or the other. Such a mental state, however, was perfectly consistent with Crosby's promise *to reexamine* the status of the relationship at the end of the agreements. Because of the nature of Crosby's promise, plaintiffs were required to produce evidence that at the time the promises were made Crosby either intended *not to reexamine* the status of the transaction or that he had formed *no* intention one way or the other on reexamining the status. The absence of any such evidence with respect to these two promises is fatal to the claim of plaintiff PSCO since, as will be discussed below, it is only on the July 1971 promise that PSCO could be said to have relied.

With respect to the promise in October 1972 which Crosby made to Hawes, the Court must assume that the plaintiffs' evidence shows that it was then Crosby's intention not to renew the second agreement. In a meeting with Philo Smith only three days after the promise to Hawes, Crosby stated that he had no intention to renew the agreement. Hawes, however, testified that he did nothing in reliance on the October 1972 promise. Thus, any fraud with respect to that promise was without significance.

Finally, the Court must assume that Crosby promised some type of extension to Rutherford on May 30, 1973, five months after the expiration of the second fee agree-

ment, when he replied "No problem, no problem" to Rutherford's query about updating the agreement. No evidence was produced revealing Crosby's state of mind at that time, however. Moreover, if it is assumed further that Crosby still intended not to reopen the fee agreement in May of 1973 as he had in October of the previous year, plaintiffs were unable to show that Rutherford's acts were "unequivocally referable" to Crosby's May 30 promise or that any acts of reliance resulted in injury to either Rutherford or PSCO.

*"Unequivocally referable" acts of reliance*

As stated above and in this Court's earlier opinion, the plaintiffs must show that their acts of reliance upon the oral promise(s) were "unequivocally referable" to such promise(s). Such a doctrine is particularly important in a statute of frauds case where the plaintiffs attempt to avoid the unambiguous terms of a written agreement. The situation here is very similar to that in *Bakhshandeh* v. *American Cyanamid Co.*, 8 App. Div. 2d 35, 185 N.Y.S.2d 635 (1st Dep't 1959), where the plaintiff attempted to show that the fixed termination date of a written agreement within the statute of frauds had been extended by an oral agreement. The court rejected that claim, finding that the plaintiff's actions were not "unequivocally referable" to the oral agreement:

> "[W]hat plaintiff claims to have done under the oral agreement could very well have been done in his own self-interest in the performance of the original [written] contract." *Id.* at 38, 185 N.Y.S.2d at 638.

The court's reasoning in *Bakhshandeh* is applicable to the actions of PSCO and Hawes in the instant case. As summarized in the statement of facts above, PSCO performed all its acts durir ime periods of the two written agreements; indeed, virt lly all of the actions were taken during the first four n nths of the first agreement. Thus, plaintiff PSCO's acts of reliance on the oral promises of July 1971 and June 1972 can, at best, be described only as *equivocally* referable to those promises. Moreover, the policies of the statute of frauds and the parol evidence rule virtually compel that any actions taken during the terms of the written agreements be found to refer to those agreeme ts alone. To allow the plaintiffs to maintain that they were relying solely on an oral promise when they had executed a legally required and internally complete written agreement would eviscerate both the statute of frauds and the parol evidence rule.

Plaintiff Rutherford, however, performed acts in 1973 following the termination of the second written agreement. While it is conceivable that these acts be found "referable" to one or more of Crosby's oral promises, particularly that of May 30, 1973, there is an equal likelihood that they referred to either of two additional situations. First, Rutherford was a substantial shareholder in All American and stood to profit from an acquisition of that company by USLIFE. Second, Rutherford testified that he was unconcerned about the termination date since, in a previous acquisition by USLIFE in which he had served as finder, Crosby had voluntarily extended the written agreement when the deal was not appropriately consummated before the expiration of the original agreement. Since Rutherford's acts could be said to have been equally in reliance on any of the three situations, the Court finds

that they were not "unequivocally referable" to the oral agreement.[5]

*Substantial Injury*

New York courts have long held that the statute of frauds cannot be used as an "instrument of fraud." Thus, where a party has been led to perform acts in reliance upon an oral promise otherwise within the statute and would suffer considerable injury if those acts were allowed to stand without the opposite party being forced to make good its oral promise, the application of the statute is said to work a fraud upon that party. As the Court of Appeals stated in *Woolley* v. *Stewart*, 222 N.Y. 347, 351, 118 N.E. 847, 848 (1918), a party can lose the right to set up the statute of frauds as a defense by

> "inducing or permitting without remonstrance another party to the agreement to do acts, pursuant to and in reliance upon the agreement, to such an extent and so substantial in quality as to irremediably alter his situation and make the interposition of the statute against performance a fraud."

In particular, the plaintiffs must show greater injury than that resulting from the mere failure of the defendants to perform the oral promise. Such a failure, standing alone, does not accomplish the required "fraud." *Bulkley* v. *Shaw*, *supra*, 289 N.Y. at 139, 44 N.E.2d at 401. Thus,

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[5] The standard applied here was stated in *Simblest* v. *Maynard*, 427 F.2d 1, 4 (2d Cir. 1970): "Simply stated, [the standard] is whether the evidence is such that . . . there can be but one conclusion as to the verdict that reasonable men could have reached." A conclusion that Rutherford's acts were "unequivocally referable" to Crosby's oral promise would be completely unreasonable.

the plaintiffs must show injury other than that resulting from USLIFE's refusal to pay a finder's fee.

The only acts performed by PSCO with regard to the All American/USLIFE transaction after the oral promise were the making of several phone calls and a trip to Chicago by Hawes. Even assuming these acts to have been performed in reliance on Crosby's oral promises (for the sake of this discussion only), they did not result in injury to PSCO. Indeed, the contacts between Gardiner and Hawes led eventually to the acquisition of another company by All American and thence to a substantial finder's fee for PSCO. Thus, the only substantial damage suffered by PSCO was USLIFE's failure to pay a finder's fee on the All American transaction, and this damage is insufficient under New York law to avoid application of the statute of frauds.

Plaintiff Rutherford was more active on the All American/USLIFE transaction than PSCO, working toward the acquisition from 1968 until the time it was consummated in 1974. He was the only plaintiff to work on the transaction after the termination of the second fee agreement. Yet, Rutherford suffered no substantial injury as a result of these activities other than the loss of a fee. Many of his acts were meetings with Ballard, a personal friend with whom he lunched on a regular basis. Moreover, these activities eventually accrued to Rutherford's financial advantage because of his substantial stock interest in All American. Invocation of the statute of frauds under these circumstances does not work the kind of injury contemplated by New York law.

For the reasons stated above, the defendant's motion for a directed verdict is granted and judgment is entered for the defendant.

*Memorandum Opinion of Tenney, D. J.*

So ordered.

Dated: New York, New York
September 24, 1976

CHARLES H. TENNEY
U.S.D.J.

## Final Judgment

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Charles H. Tenney, United States District Judge, and a jury, on September 14, 15, 16, 17 and 20, 1976, and at the conclusion of the plaintiffs' case defendant moved for a directed verdict, and the Court having reserved decision, and the Court thereafter on September 24, 1976, having handed down its opinion granting defendant's motion, and directing judgment to be entered in favor of defendant, it is,

ORDERED, ADJUDGED and DECREED: That defendant US-LIFE Corporation have judgment against plaintiffs Philo Smith & Company, Inc., and James E. Rutherford dismissing the complaint.

Dated: New York, N.Y.
September 30, 1976

RAYMOND F. BURGHARDT
Clerk

10/19/76—Bill of Costs as taxed in the sum of $2,489.49, in favor of defendant, as against both plaintiffs, and added to the judgment.

RAYMOND F. BURGHARDT
Clerk

COPY RECEIVED
DEC 30 1976
SULLIVAN & CROMWELL
ATTORNEYS FOR

Copy Received
12/30/76
Wilmer Cutler Pickering